TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 271.

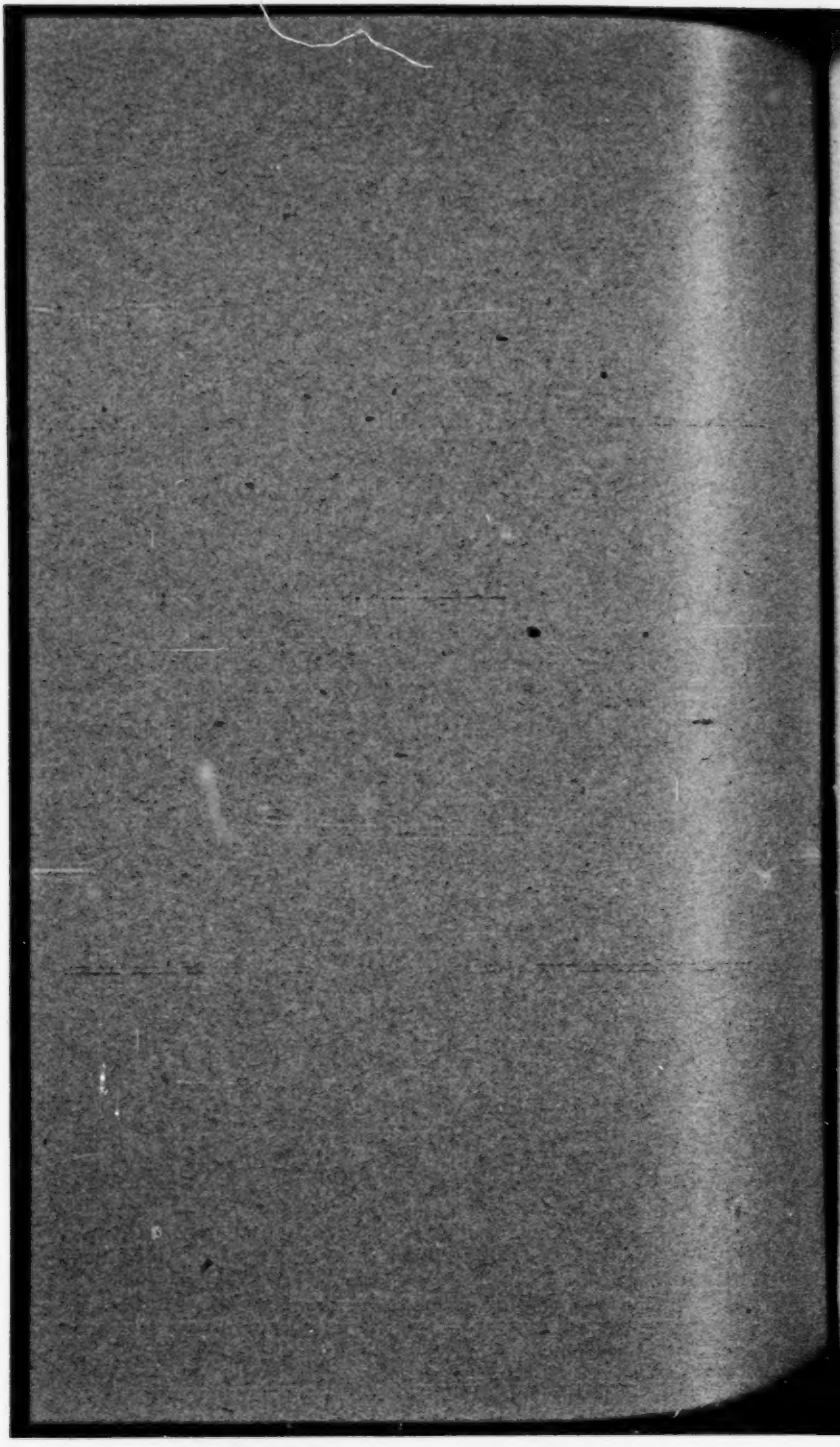
THE UNITED STATES, PETITIONER,

vs.

NATIONAL SURETY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petition for Certiorari filed March 8, 1920.
Certiorari and Return filed May 31, 1920.



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INDEX.

PLEAS AND PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AT THE DECEMBER TERM, 1919, OF SAID COURT, BEFORE THE HONORABLE WILLIAM C. HOOK AND THE HONORABLE JOHN E. CARLAND, CIRCUIT JUDGES, AND THE HONORABLE FRANK A. YOUMANS, DISTRICT JUDGE.

Attest:

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the ninth day of January, A. D. 1919, a petition to revise an order of the District Court of the United States for the Eastern District of Missouri, with transcript of certain proceedings in said district court, in the matter of Bald Eagle Mining Company, a corporation, bankrupt, in bankruptcy, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, entitled United States, petitioner, and National Surety Company, respondent, which said petition to revise and transcript of certain proceedings, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1

Petition to Revise.

In the United States Circuit Court of Appeals for the Eighth Circuit.

In the Matter of the Bald Eagle Mining Company, Bankrupt.

United States, Petitioner,

vs.

National Surety Company, Respondent.

To The Honorable Judges of the United States Circuit Circuit Court of Appeals for the Eighth Circuit:

The United States, by Benjamin L. White, Assistant United States Attorney within and for the Eastern Division of the Eastern Judicial District of Missouri, respectfully represents:

That on the 29th day of November, 1916, the Bald Eagle Mining Company, a corporation, upon its voluntary petition, was duly adjudicated a bankrupt by the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, and that upon the same day the matter of the administration of its bankrupt estate was, by said United States District Court duly referred to Walter D. Coles, Esq., Referee in Bankruptcy, in said United States District Court for said Eastern Division of the Eastern District of Missouri.

That on the 3rd day of November, 1917, the National Surety Company filed with said Referee, two claims against the estate of said Bankrupt for $3000.00 and $150.00, respectively, and that on the same day said claims were allowed as general claims against said bankrupt estate.

That on the 12th day of December, 1917, the United States filed with said Referee its claim for $9912.84 against
2 said bankrupt estate, and on the same day, said Referee made an order allowing said claim of the United States in said sum of $9912.84 and ordered and directed that said claim be accorded priority over all other claims except those for wages and taxes.

That on the 12th day of March, 1918, after the United States had secured the allowance of its claim against said bankrupt as aforesaid, said National Surety Company filed

with said Referee a motion for leave to amend its said claim for $3000.00 previously allowed as a general claim against said bankrupt estate.

That on the 12th day of March, 1918, after the United States had secured the allowance of its said claim against the estate of said bankrupt as aforesaid said National Surety Company filed with said Referee a motion for leave to amend its claim for $150.00, previously allowed as a general claim against said bankrupt estate.

That upon the filing by said National Surety Company of the two motions last above mentioned, said Referee set the same down for hearing on March 25th, 1918, at 11:00 o'clock A. M. and caused notice of such hearing to be forwarded by mail, to the Trustee of said bankrupt and to the attorneys of record of the National Surety Company and of the United States.

That thereafter, on the 25th day of March, 1918, at 11:00 o'clock A. M. the above mentioned motion of the National Surety Company for leave to amend its claim for $3000.00 as aforesaid, came on to be heard before said Referee and upon submission of same to said Referee, said Referee sustained said motion and accorded to said National Surety Company's claim for $3000.00 like priority as the claim of the United States and ordered that said claim share in the distribution of the bankrupt estate pro rata with the United States.

3 That on the said 25th day of March, 1918, at 11:00 o'clock A. M. the above mentioned motion of the National Surety Company for leave to amend its claim for $150.00 as aforesaid, came on to be heard before said Referee and upon submission of same to said Referee, said Referee sustained said motion and accorded to said National Surety Company's claim for $150.00 like priority as the claim of the United States and ordered that said claim share in the distribution of the bankrupt estate pro rata with the United States.

Thereafter upon the 3rd day of April, 1918, the United States filed with said Referee its Petition for Review, praying that the foregoing orders last above named of said Referee, be certified to the Judge of the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri for his opinion thereon, and that upon the filing of said Petition of the United States a certificate of review was duly granted by said Referee to said District Court of the United States upon said orders of said Referee allowing said National Surety Company to amend its

said claims as aforesaid and allowing and ordering said claims of said National Surety Company be accorded the same priority as the United States and that said claims be allowed to share in the distribution of said bankrupt estate pro rata with the United States.

That thereafter on the 31st day of December, 1918, said certificate of review came on to be heard by said United States District Court, and upon hearing the same said Court made an order in all respects affirming and approving said orders of said Referee, thereby sustaining the action of said Referee in allowing said National Surety Company to amend its claims as prayed and allowing said claims of the said National Surety Company the same priority as said claim of the United States and allowing said claims of said National Surety Company to share in the distribution of said bankrupt estate pro rata with the United States.

4

Petitioner states that the order of the United States District Court sustaining, approving and affirming said orders of the Referee aforesaid was and is erroneous as a matter of law in that:

First. Said United States District Court should have held and adjudged that the order of said Referee according to said claims of said National Surety Company the same priority as the claim of the United States and ordering that said claims of said National Surety Company share in the distribution of said bankrupt estate pro rata with the United States were erroneous and should have directed said Referee to change and reform his said orders accordingly, and to deny said National Surety Company's claims the same priority as that of the United States and to deny the right of said National Surety Company's claims to share pro rata in the distribution of said bankrupt estate with the United States.

Second. That said National Surety Company having, on the third day of November, 1917, filed and had allowed its said claims as general claims against said bankrupt estate it could not, by motion, filed on the 12th day of March, 1918, (more than one year after the original claim had been filed and allowed), have said claims amended by making them preferred claims and entitled to the same priority as claims of the United States, such action by said National Surety Company being in effect not an amendment of its said original claims but a substitution of other and different claims, and said United States District Court should have so held and

should have directed and ordered said Referee to
5 change and reform his said order accordingly, and to deny said National Surety Company's claims the same priority as the claim of the United States and to deny to said National Surety Company's claims the right to share pro rata with the United States in the distribution of said bankrupt estate.

Wherefore, your Petitioner, feeling aggrieved because of said orders and judgment, prays that the same may be revised in matter of law by this Honorable Court as provided in Section 24 B of the Bankruptcy Act of July 1st, 1898, and the rules of practice in such case provided and that the same be reversed, and for such other and further relief as may be just and proper.

There has been ordered of the clerk of the United States District Court, Eastern Division of the Eastern Judicial District of Missouri, for filing herewith, copies of:

Referee's Certificate of Review and attached papers, Orders of Referee of March 25th, 1918, respecting claims of National Surety Company certified by Referee to Judge of the United States District Court for his opinion thereof, together with all papers thereto attached, opinion of the United States District Court filed on the 31st day of December, 1918, and copy of Order of District Court approving and confirming said orders of said Referee and dismissing petitions of United States for review.

Dated this 8th day of January, 1919.

UNITED STATES, Petitioner.
By Benj. L. White,
Assistant United States Attorney.
Attorney for Petitioner.

6 State of Missouri,
City of St. Louis—ss.

Benjamin L. White, being duly sworn, states that he is an Assistant United States Attorney, for the Eastern District of Missouri, and as such is authorized to make this affidavit on behalf of the Petitioner, and says that the matters and

things stated in the foregoing petition are true to the best of his knowledge and belief.

BENJ. L. WHITE,
Assistant United States Attorney.

Seal
Otto O. Fickeissen
City of St. Louis, Mo.
Notary Public

Subscribed and sworn to before me this 9th day of January, 1919.

OTTO O. FICKEISSEN
Notary Public.

My term expires 2/18/1921.

Filed Jan 9 1919 E. E. Koch, Clerk.

6a Consent to filing of Petition to revise, and Waiver of Notice.

In the United States Circuit Court of Appeals for the Eighth Circuit.

In the matter of Bald Eagle Mining Company Bankrupt.

United States, Petitioner,
vs.
National Surety Company, Respondent.

Now comes the National Surety Company, Respondent, by Fordyce, Holliday, & White, its attorneys of record, and hereby consents to the filing herein by United States, of its Petition to Revise, and hereby waives notice and service of notice thereof.

NATIONAL SURETY COMPANY,
Respondent.
By Fordyce, Holliday & White
Attorneys for Respondent.

Endorsed: Filed in the U. S. Circuit Court of Appeals, January 9, 1919.

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7 (Transcript of Proceedings in the District Court.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In the Matter of Bald Eagle Mining Company, a corporation, Bankrupt, In Bankruptcy. No. 2879.

(Certificate of Referee to the District Court.)

I, Walter D. Coles, one of the Referees of said Court in Bankruptcy, do hereby certify that in the course of the pro-

ceedings in said cause before me, the following questions arose pertinent to the said proceedings:

On November 29, 1916, the Bald Eagle Mining Company, a corporation, was adjudicated bankrupt upon its voluntary petition, and on the same day the case was referred to the undersigned Referee in Bankruptcy for administration. On December 12, 1917, the United States filed with the Referee, its claim against the bankrupt in the sum of $9912.84, and on the same date, the Referee made an order allowing the claim in the sum of $9912.84, and in his order directed that the claim be accorded priority over all other claims except wages and taxes. The claim of the United States above mentioned was for damages, sustained by it, by reason of the failure of the bankrupt company to fulfil its contract with the Government for supplying coal at Jefferson Barracks, Missouri, after deducting from said damages the sum of $3,000.00 paid to the United States by the National Surety Company, the surety on the bond given the United States by the bankrupt in connection with the contract.

Prior to the allowance of the above mentioned claim of the United States, the National Surety Company, on November 3, 1917, filed with the Referee, two claims against the bankrupt for $3,000.00 and $150.00, respectively, and these
8 claims were allowed on that date as general claims. The two claims of the National Surety Company, just mentioned, are hereto attached as part of this certificate.

In its proof of claim for $3,000.00, the National Surety Company set forth its claim as follows:

"That the said Bald Eagle Mining Company, the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of Three Thousand ($3,000.00) Dollars, that the consideration of said debt is as follows: On June 14, 1916, said National Surety Company executed a contractor's bond in behalf of the Bald Eagle Mining Company to the United States of America, represented by the Quartermasters Corps of the United States Army in the penal sum of Three thousand ($3,000.00) dollars, which bond secured the faithful performance of a certain contract made by the Bald Eagle Mining Company with the United States of America to furnish bituminous lump coal, required by the United States Army at Jefferson Barracks, Missouri, from June 16, 1916 to June 30, 1917; that in consideration of the execution of said bond, the Bald Eagle Mining Company covenanted and agreed by

an instrument in writing, hereto attached and by reference made a part of this proof, to indemnify and save harmless, the said National Surety Company from any and all liability on said bond; that prior to, and since the filing of said petition for adjudication of bankruptcy, the Bald Eagle Mining Company failed to perform its said contract to furnish the coal and the obligee of said bond was compelled to buy coal on the open market during the period of said contract at prices in excess of the contract price and in a total amount in excess of the penal sum of said bond; that on October 9, 1917, said National Surety Company paid to the United States of America, represented by the Quartermasters Corps of the United States Army, Three Thousand ($3,000.00) Dollars in satisfaction in full of the liability on said bond:

That no part of the said debt has been paid by the said Bald Eagle Mining Company to said National Surety Company; that there are no set-offs or counter-claims to the same and that said corporation has not, nor has any person by its order, or to the knowledge or belief, of said deponent, for its use, had or received any manner of security for said debt whatever, and that no note has been received for said debt and no judgment recovered thereon except as herein mentioned."

In its proof of claim for $150.00, the National Surety Company set forth its claim as follows:

"That the said Bald Eagle Mining Company, the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of One Hundred and Fifty ($150.00) Dollars, that the consideration of said debt is as follows: On June 7, 1916 said National Surety Company executed a contractor's bond on behalf of the Bald Eagle Mining Company, to the United States of America, represented by the Quartermast-
9 ers Corps of the United States Army in the penal sum of One Hundred and Fifty ($150.00) dollars, which bond covered the faithful performance of a certain contract made by the Bald Eagle Mining Company with the United States of America, to furnish bituminous lump coal to the United States Arsenal of the United States Army at Saint Louis, Missouri, from July 1, 1916 to June 30, 1917; that in consideration of the execution of said bond, the Bald Eagle Mining Company agreed, by an instrument in writing, hereto attached and by reference made a part of this proof, to indemnify and save harmless, said National Surety Company from any and all liability on said bond; that prior to, and

since the filing of said petition for adjudication of bankruptcy, the Bald Eagle Mining Company failed to perform its said contract to furnish the coal and the obligee of said bond was compelled to buy coal on the open market during the period of said contract at prices in excess of the contract price and in a total amount in excess of the penal sum of said bond; that on December 30, 1916, said National Surety Company paid to the United States of America represented by the Quartermasters Corps of the United States Army, One Hundred and Fifty ($150.00) Dollars in satisfaction in full of the liability on said bond;

That no part of the said debt has been paid by the said Bald Eagle Mining Company to said National Surety Company; that there are no off-sets or counter-claims to the same and that said corporation has not, nor has any reason by its order, or to the knowledge or belief, of said deponent, for its use, had or received any manner of security for said debt whatever, and that no note has been received for said debt and no judgment recovered thereon except as herein mentioned."

On March 12, 1918, after the United States had secured the allowance of its before mentioned claim against the bankrupt company, the National Surety Company filed with the Referee a motion for leave to amend its claim for $3,000.00, previously allowed as a general claim against the bankrupt, which motion is in words and figures as follows:

"Comes now the National Surety Company, by its attorneys, and requests leave to amend the proof of claim for $3,000.00 heretofore filed by said National Surety Company against the Bald Eagle Mining Company, Bankrupt, by interlineation and adding thereto as follows:

'And the said National Surety Company, by its attorneys states that the aforesaid claims entitled to priority under the laws of the United States and more particularly under R. S. 3468, 2 Fed. Stat. Ann. (Second Ed.) Page 223, and therefore prays that the aforesaid claim be allowed as a preferred claim and accorded priority over all other claims."

On the same date, namely, March 12, 1918, the National Surety Company filed with the Referee a motion for leave to amend its claim for $150.00, previously allowed as a general claim against the bankrupt, which motion is in words and figures as follows:

"Comes now the National Surety Company, by its attorneys, and requests leave to amend the proof of claim
10 for $150.00, herefore filed by said National Surety Company against the Bald Eagle Mining Company, Bankrupt, by interlineation and adding thereto as follows:

"And the said National Surety Company, by its attorneys, states that the aforesaid claim is entitled to priority under the laws of the United States and more particularly under R. S. 3468, 2 Fed. Stat. Ann. (Second Ed.) Page 223, and therefore prays that the aforesaid claim be allowed as a preferred claim and accorded priority over all other claims.

Upon the filing by the National Surety Company of the two motions, above mentioned, the Referee set the same down for hearing on March 25, 1918, at 11 o'clock A. M. and caused notice of such hearing to be forwarded by mail, postage prepaid, to the trustee of the bankrupt and to the attorneys of record of the National Surety Company and of the United States. Thereafter, on March 25, 1918, at 11 o'clock A. M. the above mentioned motions of the National Surety Company came on to be heard before the Referee, and the trustee of the bankrupt and the National Surety Company appeared at said hearing, by their respective attorneys, but the attorney for the United States failed to appear at said hearing. Thereupon, the National Surety Company submitted to the Referee, certain evidence in support of its motions as follows:

1. Letter from R. R. Wood, Capt ain, Quartermasters Corps, dated, September 19, 1917, respecting coal purchased in open market against contract of Bald Eagle Mining Company, dated June 16, 1916.

2. Statement referred to in the above letter, showing net excess of cost of coal purchased.

3. Release and receipt of United States of America by R. R. Wood, Major, Quartermasters Corps, United States Army for $3,000.00, dated October 9, 1917.

4. Letter of Lieutenant Colonel Stanley, Quartermasters Corps, dated December 11, 1916, respecting default of Bald Eagle Mining Company, in delivering coal, pursuant to its contract.

5. Release and receipt of United States of America by Lieutenant Colonel D. S. Stanley, Quartermasters Corps, for $150.00, dated December 30, 1916.

The five documents, last mentioned, are hereto attached as part of this certificate. The record in this case shows
11 that all the property of the bankrupt company has been reduced to money, and that the trustee now has in his hands, the sum of $8,253.36, which sum, after the payment of the expenses of administration, will be available to the creditors of the bankrupt estate.

On March 25, 1918, the Referee made the following orders respecting the before mentioned claims of the National Surety Company:

March 25, 1918.

It is ordered by the Referee that the motion of the National Surety Company, for leave to amend its claim, heretofore allowed against the bankrupt estate as a general claim, for the sum of $3,000.00, be, and the same is, hereby sustained and that in respect of said claim, claimant be accorded like priority as the United States and that claimant's said claim share in the distribution of the estate pro rata with the United States."

March 25, 1918.

"It is ordered by the Referee that the motion of the National Surety Company, for leave to amend its claim, heretofore allowed against the bankrupt estate as a general claim, for the sum of $150.00, be, and the same is, hereby sustained and that in respect of said claim, claimant be accorded like priority as the United States and that claimant's said claim share in the distribution of the estate pro rata with the United States."

Thereafter on April 3, 1918, the United States filed with the Referee, its petitions (hereto attached) praying that the foregoing orders of the Referee be certified to the Judge for his opinion thereon, and said orders are certified accordingly.

(Signed) WALTER D. COLES,
Referee in Bankruptcy.

April 30, 1918.

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12 (Memorandum Opinion of the Referee on claims of National Surety Company.)

It is provided by Section 3468, Revised Statutes of the United States, that the surety on a bond, given to the United States, where the principal in the bond is insolvent, upon paying the money due upon such bond "shall have the like prior-

ity for the recovery and receipt of the moneys out of the estate and effects of such insolvent ** as is secured to the United States". In the case of Hunter vs. United States, 5 Peters 173 l. c. 182, the Supreme Court of the United States in construing this Statute, held that "like priority" means that "the same right of priority which belongs to the Government attaches to the claim of an individual, who, as surety, has paid money to the Government." Under the terms of the Statute, and especially, under the construction given the Statute in the case just mentioned, it seems clear that the National Surety Company is entitled to have its two claims against the bankrupt stand upon the same footing, as the claim of the Government and to share in the distribution of the estate on an equality with the Government, and an order will be entered accordingly.

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13 (Claim for $3000.00, of the National Surety Company, against the Bald Eagle Mining Company, filed with the Referee, on November 3, 1917.)

(Applicants must supply copy of contract specifications and other documents which are referred to and made a part of this contract.)

To be used without change by individuals, co-partnerships, and corporations for Contract or Proposal Bonds.

Application for Contract Bond.

882784.

Notice! Agents' acts not binding on Company unless within agents' written limits of authority.

To the National Surety Company (hereinafter called the Company):

The undersigned desires the Company to execute bond for it in the sum of $3,000.00 in favor of U. S. A. represented by Q. M. Corps, U. S. Army of and in such form as may be satisfactory to the Company and the above, the principal object of such bond being to guarantee the performance of a certain contract as hereinafter described. The undersigned guarantees the truth of all answers to the following interrogatories, and further guarantees the truth and accuracy of the undersigned's financial statement filed concurrently with this application. (If no financial statement is so filed, the undersigned guarantees that the last previous statement deposited with the Company represented at that time the undersigned's true and accurate financial condition and that the present net assets of the undersigned are approximately

False statement in answer to any of the interrogatories is a misdemeanor punishable by fine or imprisonment or both.

the same or more than as set forth in such previous financial statement.)

1. Applicant's name in full? Bald Eagle Mining Company.

2. Business address? (Street, City and State) Century Bldg., St. Louis, Missouri.

3. If Proposal bond, the probable total of contract is $..... and the undersigned agrees to pay $..... premium for said Proposal bond and agrees that the Company shall execute the final or contract bond if required, should the undersigned be awarded the contract, unless the Company declines so to do, which right the undersigned hereby specifically grants to the Company.

estimated

4. The amount of the contract is $8,904.00 and the undersigned hereby agrees to pay to the Company, as a premium or charge for the bond applied for, the rate of $2.50 per $1,000 of contract amount, in advance, for the first year (..) or fraction thereof and $2.50 per $1,000 annually thereafter until the undersigned shall serve upon the Company at its principal office in the City of New York, conclusive written evidence of its discharge and release from any and all liability upon said bond and all matters arising therefrom. Should the contract exceed the said amount, the undersigned agrees to pay to the Company as additional premium for such excess, a further sum, calculated at the same rates per $1,000; such additional premium to be chargeable as above from the date of the award of such additional work.

If there be any maintenance or guarantee of the contract after completion, the undersigned agrees to pay a further premium for such period of $..... per $1,000 of contract amount annually, such premium, however, to be paid in advance for the full term thereof.

5. Nature of Contract? (Give locality and description of work) for furnishing bituminous lump coal required at Jefferson Barracks, Missouri, from June 16th, 1916, to June 30th, 1917.

6. Maintenance period after completion? .....
What guarantees of tests? .....If but part of the contract is guaranteed, what part and contract price therefor? .....

7. Is contractor made liable for loss, or injury, to persons? ..... To property? .....

8. Give name and address of architect or engineer in charge. Depot Quartermaster.

9. What is his estimate of cost of work? $..... Your estimate? $.....

10. When must work begin? As required. When must it be finished? ....

11. Penalty for non-completion on time? $..... Premium for advance completion? $.....

12. Payments, when to be made on contract? monthly. Reserve? .....

13. Are payments to be made in Cash? yes. If not wholly in cash, in what manner? .....

14. How much will be sublet? nil. Will sub-contractors furnish surety bonds? .....

15. What insurance do and will you carry on this contract? Fire: .....

Name and Amount.

Public Liability	Emp. Liability
Name of Company.....	Name of Company.....
Amount of policy $.....	Amount of policy $.....
Date policy expires.....	Date policy expires.....

16. Is compensation insurance carried? ..... Name of Insurer .....

17. Names of Other Bidders on above contract, including highest and lowest?

	Name	Address	Bid
(1)	unknown	.....	$.....
(2)	.....	.....	$.....
(3)	.....	.....	$.....
(4)	.....	.....	$.....
(5)	.....	.....	$.....

18. Have you applied elsewhere for this bond? no. State name of company and why declined ....

19. What other surety companies have you deal with? .....

20. What other similar contracts have you completed On Your Own Account? .....

....

....

21. State particulars of Present Uncompleted Contracts:

Description	Location	Total of Contract	Amount Completed	Probable Date of Completion
.....	.....	$.....	$.....	.....
.....	.....	$.....	$.....	.....
.....	.....	$.....	$.....	.....

22. With what bank have you arranged a loan for the purpose of handling this contract? .....

23. What is the amount of such loan? $.....

24. What security, if any, has the bank required for the loan? .....

25. When and how must you repay the loan? .....

26. Have you assigned or will you assign your payment on this contract, or any part thereof? .....

27. Is your present plant sufficient for this contract?.... .....If not, state what needed and expenditure necessary .....

28. Are you surety or endorser upon any bond, note, or other obligation not included in your liabilities? ..... If so, give names and amounts .....

29. Are you having Any controversy with Any one over Any contract or payment of labor or material bills on Any contract? .....

30. Are there Any mechanics' liens filed on Any of your work anywhere? .....

31. Are there any judgments against you? .....

32. Have you ever failed in business? .....

33. Are you threatened with any law suits? ..... Are you interested in more than one line of business? ..... If so, give particulars .....

34. If a Corporation, answer these questions: Capital paid in cash? $..... In what State incorporated? ..... When? ..... Principal Office? ..... President's name? ..... Vice-President's name? ..... Secretary's name? ..... Treasurer's name? ..... Directors' names? .....

35. If a Co-Partnership, give the names of all individuals composing same:

Name	Address	Age
.....	.....	.....
.....	.....	.....

If a special partnership, give name of special partner and amount obligated for:

.....

36. In what company are your employes bonded? .....
.....Do their bonds expire during the life of this contract? ..... Give date .....

References.

Name	Occupation	Address
(1).....	.....	.....
(2) see previous applications		.....
(2).....	.....	.....
(3).....	.....	.....
(4).....	.....	.....
(5).....	.....	.....

14 In Consideration of the execution of said bond by the National Surety Company (hereinafter called the Company), the undersigned hereby covenants with the Company, its successors and assigns:

1st. To furnish to the Company upon request, the complete figures showing the full amount of contract herein referred to, or the Company may, at its option apply to the obligee for such information, which the obligee is hereby authorized to furnish, and the Company is authorized to inspect the books of the undersigned relating thereto, for the purpose of ascertaining the correct amounts.

2nd. That in the event the Company executes said bond with Co-sureties or reinsures any portion of said bond with Reinsuring Companies, or procures the execution of said bond, the undersigned agrees that all of the terms and conditions of this agreement shall apply and operate for the benefit of the Company, the Co-sureties, the Re-insuring Companies and the procured sureties, as their interests may appear.

3rd. That the undersigned will at all times indemnify and keep indemnified, the Company, and hold and save it harmless from and against any and all liability, damages, loss, costs, charges and expenses of whatever kind or nature, including counsel and attorney's fees, which the Company shall

or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the Company of any and all other bonds executed for us at our instance and request, and that we will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money which the Company or its representatives shall pay, or cause to be paid, or become liable to pay, on account of the execution of any such instrument, and on account of any liability, damage, costs, charges and expenses of whatsoever kind or nature, as well, also, in connection with any litigation, investigation, collecting any premium due or losses sustained or other matters connected therewith, including counsel and attorney's fees, such payment to be made to the Company as soon as it shall have become liable therefor, whether the Company shall have paid said sum or any part thereof or not. That in any accounting which may be had between the undersigned and the Company, the Company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether such liability, necessity, or expediency existed or not.

4th. That in the event of the failure of the undersigned to comply with or make due performance of any covenant hereof, the Company may at any time thereafter take such steps as it may deem necessary or proper to obtain its release from all liability under any and every such bond, and to secure and further indemnify itself against loss, and all damage and expense which the Company may sustain or incur, or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by the undersigned.

5th. That for the better protection of the Company, the undersigned does, as of the date hereof, hereby assign, transfer and convey to the Company, all the right, title and interest of the undersigned in and to all the tools, plant, equipment and materials of every nature and description that it may now or hereafter have upon said work, or in, on or about the site thereof, including, as well, materials purchased for or chargeable to said contract, which may be in process of construction, on storage elsewhere, or in transportation to said site, hereby assigning and conveying also, all its rights in and to all sub-contracts, which have been or may hereafter be en-

tered into, and the materials embraced therein, and
15 authorizing and empowering the Company, its authorized agents or attorneys, to enter upon and take possession of said tools, plant, equipment, materials and subcontracts, and enforce, use and enjoy such possession upon the following conditions, viz.: This assignment shall be in full force and effect, as of the date hereof, should the undersigned fail or be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on the undersigned's part under the said contract or in the payment of premiums.

6th. That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the Company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said bond.

7th. That in the event the Company is required to reserve from its assets an amount to cover any contingent claim or claims under the bond herein applied for, by reason of default of the undersigned, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason whatsoever, the undersigned hereby covenants and agrees to immediately on demand deposit with the Company, in current funds, an amount sufficient to cover any such contingent claim or claims, as a trust fund or collateral security, to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument; and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including counsel or attorney's fees, which it may thereby incur, shall be included in such action and paid by the undersigned.

8th. That the undersigned further authorizes and empowers any attorney in any State of the United States on behalf of the Company, to appear for the undersigned, and confess judgment against the undersigned, for any sum or

sums of money up to the amount of the bond executed by the Company upon the faith and security afforded by the undersigned under this agreement, with costs, interest and counsel or attorney's fees; this authority to continue until the Company's liability under the bond shall have wholly terminated. Whenever the laws of any State shall provide a method for confession of judgment to which the authority hereby given will not apply, the undersigned further agrees to execute upon the company's demand such papers as will carry into effect the entry of judgment by confession as above agreed against the undersigned.

9th. That no act or omission of the Company, in modifying, amending, limiting, or extending any instrument executed by the Company, shall in any wise affect the undersigned's liability hereunder, and the undersigned agrees that the Company may alter, change, modify, amend, limit, or extend any instrument, and may execute renewals thereof, or other and new obligations in its place, or in lieu thereof, and without notice to the undersigned, notice being expressly waived, and in any such case, the undersigned shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, amended, limited or extended instrument, of such renewals thereof, or other or new obligations in its place or in lieu thereof, as fully as if such instrument were described at length herein.

16 10th. That it shall not be necessary for the Company to give the undersigned notice of any act, fact or information coming to the notice or knowledge of the Company concerning or affecting its rights or liability under any such instrument by it so executed, or the undersigned's rights or liabilities hereunder, notice of all such being hereby expressly waived.

11th. That these covenants and also all collateral security, if any, at any time deposited with the Company concerning the said bond or any other former or subsequent bonds, executed for the undersigned or at its instance, shall, at the option of the Company, be available in its behalf and for its benefit as well concerning the bond or undertaking hereby applied for, as also concerning all other former or subsequent bonds and undertaking executed for us or for others at our request.

12th. That the Company shall have the exclusive right for itself, and for the undersigned, to decide and determine whether any claim, demand, liability, suit, action, order, judg-

ment or adjudication, made or brought against the Company and principal on said bond, jointly or severally, shall or shall not be defended, tried or appealed, and its decisions shall be final, conclusive and binding upon the undersigned, and any order, judgment or adjudication made, entered or affirmed as a result thereof, or any loss, cost, charge, expense or liability thereby incurred, sustained or paid, shall be borne by the undersigned, and the undersigned especially consents thereto.

Dated at St. Louis Missouri this 14th day of July 1916.

(Signed) BALD EAGLE MINING CO.
By O. L. Winkle, Pres.
(Officer's name and title if applicant be a corporation)

Note,—If a co-partnership, firm name must be signed, also name of individual who signs. If corporation, corporate name must be signed in full, with officer's name and title on line below.

17 State of.....
County of.....—ss.

On this ..... day of ....., 19...., before me personally came .....
to me known and known to me to be the individual described in and who executed the foregoing agreement, and ..... acknowledged that he executed the same.

State of.....
County of .....—ss.

On the ..... day of ....., 19...., before me personally came ....., to me known, and who, being duly sworn, did depose and say: That he resides in .....; that he is the.....of ....., the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

State of.....
County.....—ss.

On this .....day of....., 19...., before me personally came ....., to me known and known to me to be a member of the firm of....., described in and

who executed the foregoing agreement, and acknowledged that he executed the same as and for the act and deed of said firm.

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18 (Proof of Claim of National Surety Company, for $3000.00.)

At St. Louis, in said Division of said District on the third day of November, A. D. 1917, came Leslie J. Nichols of the City of St. Louis and State of Missouri, and made oath and says that he is Resident Secretary of the National Surety Company, a corporation incorporated by and under the laws of the State of New York and that he is duly authorized to make this proof, and says that the said Bald Eagle Mining Company, the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of Three Thousand ($3,000.00) Dollars, that the consideration of said debt is as follows: On July 14, 1916, said National Surety Company executed a contractor's bond in behalf of the Bald Eagle Mining Company to the United States of America, represented by the Quartermasters Corps of the United States Army in the penal sum of Three thousand ($3,000.00) Dollars which bond secured the faithful performance of a certain contract made by the Bald Eagle Mining Company with the United States of America to furnish bituminous lump coal required by the United States Army at Jefferson Barracks, Missouri, from June 16, 1916 to June 30, 1917; that in consideration of the execution of said bond, the Bald Eagle Mining Company covenanted and agreed by an instrument in writing, hereto attached and by reference made a part of this proof, to indemnify and save harmless, the said National Surety Company for any and all liability on said bond; that prior

19 to, and since the filing of said petition for adjudication of bankruptcy, the Bald Eagle Mining Company failed to perform its said contract to furnish the coal and the obligee of said bond was compelled to buy coal on the open market during the period of said contract at prices in excess of the contract price and in a total amount in excess of the penal sum of said bond; that on October 9, 1917, said National Surety Company paid to the United States of America, represented by the Quartermasters Corps of the United States Army, Three Thousand ($3,000.00) Dollars in satisfaction in full of the liability on said bond;

That no part of the said debt has been paid by the said Bald Eagle Mining Company to said National Surety Company; that there are no set-offs or counter-claims to the same and that said corporation has not, nor has any person by its order, or to the knowledge or belief, of said deponent, for its use, had or received any manner of security for said debt whatever, and that no note has been received for said debt and no judgment recovered thereon except as herein mentioned.

NATIONAL SURETY COMPANY,
L. J. Nichols,
Resident Secretary of said Company.

Subscribed and sworn to before me this 3rd day of November, A. D. 1917.

(Seal) (Signed) MARIE E. PAUCK,
Notary Public.

My commission expires 5-3-19.

(Claim for $150.00, of the National Surety Company against the Bald Eagle Mining Company, filed with the Referee, on November 3, 1917.)

(Applicants Must Supply Copy of Contract Specifications and Other Documents which are Referred to and made a part of this Contract.)

To be used without change by individuals, co-partnerships, and corporations for Contract or Proposal Bonds.

Application for Contract Bond.

897872

Notice! Agents' acts not binding on Company unless within agents' written limits of authority.

To the National Surety Company (hereinafter called the Company):

The undersigned desires the Company to execute bond for it in the sum of $150.00 in favor of United States of America of U. S. A. and in such form as may be satisfactory to the Company and the above, the principal object of such bond being to guarantee the performance of a certain contract as hereinafter described. The undersigned guarantees the truth of all answers to the following interrogatories, and further guarantees the truth and accuracy of the undersigned's financial statement filed concurrently with this application. (If no financial statement is so filed, the undersigned guarantees that

the last previous statement deposited with the Company represented at that time the undersigned's true and accurate financial condition and that the present net assets of the undersigned are approximately the same or more than as set forth in such previous financial statement.)

1. Applicant's Name in Full? Bald Eagle Mining Company, Inc. Received

2. Business address? (Street, City and State) 504 Century Bldg., St. Louis, Mo. June 9, 1916.

3. If Proposal bond, the probable total of contract is $.... and the undersigned agrees to pay City Com*** Dept. premium for said Proposal bond and agrees that the Company shall execute the final or contract bond if required, should the undersigned be awarded the contract, unless the Company declines so to do, which right the undersigned hereby specifically grants to the Company.

4. The Amount of the Contract is $840.00 (Est) and the undersigned hereby agrees to pay to the Company, as a Premium or charge for the bond applied for, the rate of $2.50 per $1,000 of contract amount, in advance, for the first..... .....year ( ) or fraction thereof and $2.50 per $1,000 annually thereafter until the undersigned shall serve upon the Company at its principal office in the City of New York, conclusive written evidence of its discharge and release from any and all liability upon said bond and all matters arising therefrom. Should the contract exceed the said amount, the undersigned agrees to pay to the Company as additional premium for such excess, a further sum, calculated at the same rates per $1,000; such additional premium to be chargeable as above from the date of the award of such additional work.

If there be any maintenance or guarantee of the contract after completion, the undersigned agrees to pay a further premium for such period of $..... per $1,000 of contract amount annually, such premium, however, to be paid in advance for the full term thereof.

5. Nature of Contract? (Give locality and description of work) to Supply Coal at U. S. Arsenal St. Louis, Mo. for fiscal year 1916 1917.

6. Maintenance period after completion?.....What guarantees of tests?.....If but part of the contract is guaranteed, what part and contract price therefor?.....

7. Is contractor made liable for loss, or injury, to persons? .....To property? .....

8. Give name and address of architect or engineer in charge Lieut. Colonel D. S. Stanley U. S. Army.

9. What is his estimate of cost of work? $840.00 Your estimate? $840.00

10. When must work begin? July 1st. 1916. When must it be finished? June 30th, 1917.

11. Penalty for non-completion on time? $ none Premium for advance completion? $.....

12. Payments, when to be made on contract?..... .....Reserve?.....

13. Are payments to be made in Cash? Yes. If not wholly in cash, in what manner?..... .....

14. How much will be sublet? none Will sub-contractors furnish surety bonds?.....

15. What insurance do and will you carry on this contract? Fire: .....
Name and Amount

Public Liability	Emp. Liability
Name of Company.....	Name of Company.....
Amount of policy $.....	Amount of policy $.....
Date policy expires.....	Date policy expires.....

16. Is compensation insurance carried?.....
Name of Insurer .....

17. Names of Other Bidders on above contract, including highest and lowest?

	Name	Address	Bid
(1)	.....	.....	$.....
(2)	.....	.....	$.....
(3)	.....	.....	$.....
(4)	.....	.....	$.....
(5)	.....	.....	$.....

18. Have you applied elsewhere for this bond? no State name of company and why declined..... ....

19. What other surety companies have you dealt with? see your files

20. What other similar contracts have you completed On Your Own Account?....see your files

21. State particulars of President Uncompleted Contracts:

Description	Location	Total of Contract	Amount Completed	Prob. Date of Comp.
.....	.....	$.....	$.....	.....
All Completed		$.....	$.....	.....
.....	.....	$.....	$.....	.....

22. With what bank have you arranged a loan for the purpose of handling this contract?.....

23. What is the amount of such loan? $.....

24. What security, if any, has the bank required for the loan? .....

25. When and how must you repay the loan?.....
.....

26. Have you assigned or will you assign your payment on this contract, or any part thereof? No.

27. Is your present plant sufficient for this contract? yes If not, state what needed and expenditure necessary.....
.....

28. Are you surety or endorser upon any bond, note, or other obligation not included in your liabilities? no If so, give names and amounts.....

29. Are you having Any controversy with Any one over Any contract or payment of labor or material bills on Any contract? no.

30. Are there Any mechanics' liens filed on Any of your work anywhere? no

31. Are there any judgments against you? no

32. Have you ever failed in business? no

33. Are you threatened with any law suits? no

Are you interested in more than one line of business?
.....
If so, give particulars.....

34. If A Corporation, answer these questions: Capital paid in cash? $.....

In what State incorporated? See your Files
When? .....Principal Office? .....

President's name?.....Vice-President's name?.....

Secretary's name?.....Treasurer's name?.....

Directors' names? .....

35. If A Co-Partnership, give the names of all individuals composing same:

Name	Address	Age
.....	.....	.....
X X	.....	.....

If a special partnership, give name of special partner and amount obligated for:

.....

36. In what company are your employes bonded? National Surety Company.

Do their bonds expire during the life of this contract?.....

Give date .....

References.

Name	Occupation	Address.
(1).....	.....	.....
(2) See Your Files.	.....	.....
(3).....	.....	.....
(4).....	.....	.....
(5).....	.....	.....

21 In Consideration of the execution of said bond by the National Surety Company (hereinafter called the Company), the undersigned hereby covenants with the Company, its successors and assigns:

1st. To furnish to the Company upon request, the complete figures showing the full amount of contract herein referrred to, or the Company may, at its option apply to the obligee for such information, which the obligee is hereby authorized to furnish, and the Company is authorized to inspect the books of the undersigned relating thereto, for the purpose of ascertaining the correct amounts.

2nd. That in the event the Company executes said bond with Co-sureties or reinsures any portion of said bond with Reinsuring Companies, or procures the execution of said bond, the undersigned agrees that all of the terms and con-

ditions of this agreement shall apply and operate for the benefit of the Company, the Co-sureties, the Reinsuring Companies and the procured sureties, as their interests may appear.

3rd. That the undersigned will at all times indemnify and keep indemnified, the Company, and hold and save it harmless from and against any and all liability, damages, loss, costs, charges and expenses of whatever kind or nature, including counsel and attorney's fees, which the Company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the Company of any and all other bonds executed for us at our instance and request, and that we will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money which the Company or its representatives shall pay, or cause to be paid, or become liable to pay, on account of the execution of any such instrument, and an account of any liability, damage, costs, charges and expenses of whatsoever kind or nature, as well, also, in connection with any litigation, investigation, collecting any premium due or losses sustained or other matters connected therewith, including counsel and attorney's fees, such payment to be made to the Company as soon as it shall have become liable therefor, whether the Company shall have paid said sum or any part thereof or not. That in any accounting which may be had between the undersigned and the Company, the Company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether such liability, necessity, or expediency existed or not.

4th. That in the event of the failure of the undersigned to comply with or make due performance of any covenant hereof, the Company may at any time thereafter take such steps as it may deem necessary or proper to obtain its release from all liability under any and every such bond, and to secure and further indemnify itself against loss, and all damage and expense which the Company may sustain or incur, or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by the undersigned.

5th. That for the better protection of the Company, the undersigned does, as of the date hereof, hereby assign, transfer

and convey to the Company, all the right, title and interest of the undersigned in and to all the tools, plant, equipment and materials of every nature and description that it may now or hereafter have upon said work, or in, on or about the site thereof, including, as well, materials purchased for or chargeable to said contract, which may be in process of construction, on storage elsewhere, or in transportation to said site, hereby assigning and conveying also, all its rights in and to all sub-contracts, which have been or may hereafter be entered into, and the materials embraced therein, and author-
22 izing and empowering the Company, its authorized agents or attorneys, to enter upon and take possession of said tools, plant, equipment, materials and sub-contracts, and enforce, use and enjoy such possession upon the following conditions, viz.: This assignment shall be in full force and effect, as of the date hereof, should the undersigned fail or be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on the undersigned's part under the said contract or in the payment of premiums.

6th. That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the Company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said bond.

7th. That in the event the Company is required to reserve from its assets an amount to cover any contingent claim or claims under the bond herein applied for, by reason of default of the undersigned, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason whatsoever, the undersigned hereby covenants and agrees to immediately on demand deposit with the Company, in current funds, an amount sufficient to cover any such contingent claim or claims, as a trust fund or collateral security, to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument; and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and

expenses, including counsel or attorney's fees, which it may thereby incur, shall be included in such action and paid by the undersigned.

8th. That the undersigned further authorizes and empowers any attorney in any State of the United States on behalf of the Company, to appear for the undersigned, and confess judgment against the undersigned, for any sum or sums of money up to the amount of the bond executed by the Company upon the faith and security afforded by the undersigned under this agreement, with costs, interest and counsel or attorney's fees; this authority to continue until the Company's liability under the bond shall have wholly terminated, Whenever the laws of any State shall provide a method for confession of judgment to which the authority hereby given will not apply, the undersigned further agrees to execute upon the company's demand such papers as will carry into effect the entry of judgment by confession as above agreed against the undersigned.

9th. That no act or omission of the Company, in modifying, amending, limiting, or extending any instrument executed by the Company, shall in any wise affect the undersigned's liability hereunder, and the undersigned agrees that the Company may alter, change, modify, amend, limit, or extend any instrument, and may execute renewals thereof, or other and new obligations in its place, or in lieu thereof, and without notice to the undersigned, notice being expressly waived, and in any such case, the undersigned shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, amended, limited or extended instrument, of such renewals thereof, or other or new obligations in its place or in lieu thereof, as fully as if such instrument were described at length herein.

23 10. That it shall not be necessary for the Company to give the undersigned notice of any act, fact or information coming to the notice or knowledge of the Company concerning or effecting its rights or liability under any such instrument by it so executed, or the undersigned's rights or liabilities hereunder, notice of all such being hereby expressly waived.

11th. That these covenants and also all collateral security, if any, at any time deposited with the Company concerning the said bond or any other former or subsequent bonds, executed for the undersigned or at its instance, shall, at the option of the Company, be available in its behalf and for its benefit as well concerning the bond or undertaking hereby

applied for, as also concerning all other former or subsequent bonds and undertaking executed for us or for others at our request.

12th. That the Company shall have the exclusive right for itself, and for the undersigned, to decide and determine whether any claim, demand, liability, suit, action, order, judgment or adjudication, made or brought against the Company and principal on said bond, jointly or severally, shall or shall not be defended, tried or appealed, and its decisions shall be final, conclusive and binding upon the undersigned, and any order, judgment or adjudication made, entered or affirmed as a result thereof, or any loss, cost, charge, expense or liability thereby incurred, sustained or paid, shall be borne by the undersigned, and the undersigned especially consents thereto.

Dated at St. Louis, Mo. this 7th [dau] of June 1916

BALD EAGLE MINING CO.
By F. S. Collier, Secy.
(Officer's name and title if applicant be a corporation)

Witness to [signiture]
L. J. Nichols,

Note,—If a co-partnership, firm name must be signed, also name of individual who signs. If corporation, corporate name must be signed in full, with officer's name and title on line below.

24 State of.....
County of.....—ss.

On this.....day of....., 19...., before me personally came .....
to me known and known to me to be the individual described in and who executed the foregoing agreement, and..... acknowledged that he executed the same.

State of.....
County of.....—ss.

On the .....day of ....., 19...., before me personally came....., to me known, and who, being duly sworn, did depose and say: That he resides in.....; that he is the .....of....., the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said

corporation, and that he signed his name to the said instrument by like order.

State of.....
County of.....—ss.

On this.....day of....., 19...., before me personally came ....., to me known and known to me to be a member of the firm of....., described in and who executed the foregoing agreement, and acknowledged that he executed the same as and for the act and deed of said firm.

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25 (Proof of Claim of National Surety Company for $150.00.)

At St. Louis, in said Division of said District on the third day of November, A. D. 1917, came Leslie J. Nichols of the City of St. Louis and State of Missouri, and made oath and says that he is Resident Secretary of the National Surety Company, a corporation incorporated by and under the laws of the State of New York and that he is duly authorized to make this proof, and says that the said Bald Eagle Mining Company, the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of One Hundred and Fifty ($150.00) Dollars, that the consideration of said debt is as follows: On June 7, 1916, said National Surety Company executed a contractor's bond on behalf of the Bald Eagle Mining Company, to the United States of America, represented by the Quartermasters Corps of the United States Army in the penal sum of One Hundred and Fifty ($150.00) Dollars which bond covered the faithful performance of a certain contract made by the Bald Eagle Mining Company with the United States of America, to furnish bituminous lump coal to the United States Arsenal of the United States Army at Saint Louis, Missouri from July 1, 1916 to June 30, 1917; that in consideration of the execution of said bond, the Bald Eagle Mining Company agreed, by an instrument in writing, hereto attached and by reference made a part of this proof, to indemnify and save harmless, said National Surety Company from any and all liability on said bond; that prior to, and since the filing of said petition for adjudication of bankruptcy, the Bald Eagle Mining Company failed to perform its said contract to furnish the coal and the obligee
26 of said bond was compelled to buy coal on the open market during the period of said contract at prices in

excess of the contract price and in a total amount in excess of the penal sum of said bond; that on December 30, 1916 said National Surety Company paid to the United States of America, represented by the Quartermasters Corps of the United States Army, One Hundred and Fifty ($150.00) Dollars in satisfaction in full of the liability on said bond;

That no part of the said debt has been paid by the said Bald Eagle Mining Company to said National Surety Company; that there are no set-offs or counter-claims to the same and that said corporation has not, nor has any person by its order, or to the knowledge or belief, of said deponent, for its use, had or received any manner of security for said debt whatever, and that no note has been received for said debt and no judgment recovered thereon except as herein mentioned.

NATIONAL SURETY COMPANY,
(Signed L. J. Nichols.
Resident Secretary. Of said
Company.

Subscribed and sworn to before me third 3rd day of November, A. D. 1917.

(Seal)

(Signed) MARIE E. PAUCK,
Notary Public.

My commission expires May 3-1919.

27

Office of the Quartermaster.

Recruit Depot.

Jefferson Barracks, Mo.

September 19, 1917.

From: The Quartermaster.
To. National Surety Company,
Pierce Building, St. Louis, Mo.

Subject: Coal purchased in open market against contract of Bald Eagle Mining Company, dated June 16th, 1916.

1. Your attention is called to enclosed statement showing net excess cost of coal purchased in open market by this office against Bald Eagle Mining Co.

2. Under and in accordance with the terms of the bond, executed by your company, for the faithful fulfillment of said contract, demand is hereby made upon you for payment of

the amount of said excess of $12,912.84. Unless settlement in full is made by twelve o'clock noon, September 26, 1917. the case will be submitted to the Department of Justice for Legal action in the premises.

3. A similar demand has this date been made upon the Trustee in Bankruptcy for the Bald Eagle Mining Company.

R. R. WOOD,
Captain, Quartermaster Corps.

1 Incl.
AAL:S

STATEMENT OF BITUMINUS COAL PURCHASED IN OPEN MARKET AGAINST CONTRACT OF BALD EAGLE MINING CO DATED 6/16/16.

Coal purchased From	Delivery Made	Pounds	Tons	Price Per Ton	Vou. No. Acct. Capt. R. R. Wood WMC. Date Paid	(Per. Bureau of mines Analysis QM Amount Paid		Value at ($1,922 per T Excess Chargeable To Bald Eagle Company.	
John Eichborn,	11-29-16	261500	130.75	$5.275	12/ 6/16	$689.71	14	$251.30	$436.41
Wm. F. Ruprecht Const. & Inv. Co.	12- 4-16	131280	65.64	5.20	12/12/16	341.33	39	126.16	215.17
Big Muddy Coal & Iron Co.	12/ 7/16	95740	47.87	4.80	12/14/16	229.78	85	92.01	137.77
Wm. F. Ruprecht Const. & Inv. Co.	12/11/16	214470	107.235	5.00	12/20/16	536.18	119	206.10	330.08
Inland Valley Coal Co.	12/30/16	834520	417.26	3.65	1/ 8/17	1523.00	14	801.97	721.03
Donk Bros. Coal & Coak Co.	1/ 9/17	318080	159.04	4.65	1/15/17	739.54	52	305.67	433.87
Donk Bros. Coal & Coak Co.	1/ 4/17	897860	448.93	3.625	1/15/17	1627.37	53	862.84	764.53
Wm. F. Ruprecht Const. & Inv. Co.	1/18/17	1013790	506.895	4.45	1/27/17	2255.68	130	974.25	1281.43
James C. Blythe,	1/31/17	806050	403.025	4.35	2/23/17	1753.16	106	774.61	978.55
James C. Blythe,	3/23/17	2491510	1245.755	4.35	5/ 5/17	5227.19	51	2395.54	2831.85
James C. Blythe,	5/17/17	3788410	1894.205	4.35	5/19/17	8239.79	179	3640.66	4599.13
James C. Blythe,	6/27/17	659380	329.69	4.35	7/ 5/17	1434.15	15	633.66	800.49
Totals		11512590	5756.295			24596.88		11064.57	$13532.31
	Due Bald Eagle Mining Company for deliveries not paid for - - - - -								619.47
									$12912.84

Total Excess due United States by Bald Eagle Mining Company.

R. R. Wood
Captain Quartermaster Corps"

Contract price modified in accordance with anylysis of B/M of Deliveries made under contract.

29 (Release and Receipt for $3000.00)

This Release and Receipt, dated this 9th day of October 1917, by and between the United States of America, represented by Captain, R. R. Wood, Quartermasters' Corp, United States Army, party of the first part and the Nation-Surety Company of the City of New York, State of New York, party of the second part, Witnesseth:

Whereas, on or about the fourteenth day of July 1916, said party of the second part executed in behalf of the Bald Eagle Mining Company, as principal, contractors' bond 882784, indemnifying the United States of America, Quartermasters' Depot, for the faithful performances of said principal, Bald Eagle Mining Company to furnish bituminous lump coal required by the United States Army, at Jefferson Barracks, Missouri, from June 16th, 1916 to June 30th, 1917, said bond being in the penal sum of Three Thousand Dollars, ($3000.00).

And Whereas, said Bald Eagle Mining Company has failed to carry out the terms and conditions of said bond and contract with the party of the first part and said party of the first was required to fill said contract on the open market and said party of the first part did buy coal on the open market at the best price obtainable and the amount due under said bond from the party of the second part to the party of the first is the sum of Three Thousand Dollars, ($3,000.00).

Now Therefore, for and in consideration of the sum of Three Thousand Dollars, ($3000.00) in hand paid to the party of the first part by the party of the second part, receipt whereof is hereby acknowledged by the party of the first part, the party of the first part acknowledges the said payment in full settlement and satisfaction of all claims, charges, damages and controversies existing or which may in the future exist or arise out of said bond above set forth and discharges and agrees forever to hold harmless, the said party of the second part from any and all liability, judgment or damages arising or which in the future may
30 arise out of said bond.

In Witness Whereof, the parties hereto have set their hands and seals this 9th day of October 1917.

UNITED STATES OF AMERICA.
By R. R. Wood,
Major, Q. M. Corps, U. S. A.

NATIONAL SURETY COMPANY,
By Fordyce, Holliday & White,
Its Attorneys.

31

War Department

Office of the Depot Quartermaster

St. Louis, Mo.

Dec. 11, 1916.

No. 29638.

From Depot Quartermaster.
To National Surety Co., 115 Broadway, N. Y.

Subject Contract Bald Eagle Mining Co. Inc.

1. Reference above mentioned contract for furnishing and delivering at this depot run of mine bituminous coal, you are advised that the following calls were made upon the above Company for delivery of coal as follows:

Nov. 1st	call 23,	40 tons	at $2.00 per ton.....	$80.00
" "	" 24,	20 "	" 2.00 " "	40.00
" "	" 25,	5 "	" 2.00 " "	10.00
" "	" 28,	40 "	" 2.00 " "	80.00
			Total	$210.00

2. Owing to the failure of the Bald Eagle Mining Company to make deliveries on the above orders this office was compelled to purchase in open market the following:

Nov. 25th,	call 30,	4 tons	at $4.00 per ton	$16.00
" "	" 31,	4 "	" 4.00 " "	16.00
" 27th,	" 34,	11 "	" 4.00 " "	44.00
Dec. 2nd.	" 36,	15 "	" 4.00 " "	60.00
" "	" 37,	5 "	" 4.00 " "	20.00
" 6th	" 39,	10 "	" 4.00 " "	40.00

"	9th	40, 27	"	"	4.00	"	"	108.00
						Total		$304.00
						Total Cont. cost.		152.00
						Excess		152.00

3. Your company having bonded the Bald Eagle Mining Company, in the sum of $150. it is requested that you forward to this office a check for this amount with a view of avoiding legal procedure.

STANLEY
Lieut. Col. Q. M. Corps,
Recorded J. L. D.

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32 (Release and Receipt for $150.00)

This Release and Receipt, dated this 30th day of December, 1916, by and between Colonel D. S. Stanley, United States Quartermaster of the United States Government, party of the first part, and National Surety Company, of the City of New York, State of New York, party of the second part, Witnesseth:

That whereas, on or about the 7th day of June, 1916, said party of the second part executed in behalf of the Bald Eagle Mining Company, as principal, contractors's bond Number 897872, indemnifying the United States of America Quartermaster's Depot for the faithful performance of said principal, Bald Eagle Mining Company, to deliver and supply coal at the United States Arsenal, for the fiscal year, from July 1st, 1916, to June 30th, 1917, said bond being in the penal amount of One Hundred and Fifty Dollars ($150.00);

And whereas said Bald Eagle Mining Company has failed to carry out the terms and conditions of said bond and contract with said party of the first part, and said party of the first part was required to fulfill said contract on the open market, and said party of the first part did buy coal on the open market, at the best price obtainable, and the amount due under said bond from the party of the second part to the party of the first part is the sum of One Hundred and Fifty Dollars ($150.00);

Now Therefore, for and in consideration of the sum of One Hundred and Fifty Dollars ($150.00), in hand paid to the party of the first part by the party of the second part, receipt whereof is hereby acknowledged by said party of the

first part, the party of the first part acknowledges said payment, in full settlement and satisfaction of all claims, charges, damages, and controversies existing, or which may in the future exist or arise out of said bond above set forth, and discharges and agrees to forever hold harmless the said party of the second part from any and all liability, judg-
33 ments or damages arising, or which may in the future arise, out of said bond.

In Witness Whereof, the parties hereto have set their hands, this 30th day of December, 1916.

UNITED STATES OF AMERICA,
By D. S. Stanley,
Lieutenant colonel, Q. M. Corps, D. Q. M.
United States Quartermaster.

NATIONAL SURETY COMPANY,
By Fordyce, Holliday, & White,
Its Attorneys.

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34 (Petition for review of Order of Referee on Claim of National Surety Company, for $3000.00).

To Honorable Walter D. Coles, Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is a creditor of the Bald Eagle Mining Company, the above named bankrupt, and that its claim has been allowed herein and accorded priority under the law of the United States, and particularly under Section 3466 of the Revised Statutes of the United States.

That on the 25th day of March, 1918, an order, a copy of which is hereto annexed, was made and entered herein.

That such order was and is erroneous in that, allowing the prayer of said National Surety Company's petition to amend its Proof of Claim of Three Thousand Dollars ($3,000) against said Bald Eagle Mining Company, bankrupt, by [a] according to its said claim priority was an attempted novation and was not in legal effect, an order allowing an amendment of said National Surety Company's Proof of Claim, but was, in legal effect, allowing a new and different claim by said National Surety Company against said bankrupt which could not lawfully be allowed in favor of said National Surety Company after the 28th day of November, 1917, said Bald Eagle Mining Company having been adjudicated a bankrupt on the 29th day of November, 1916.

That such order was and is erroneous, in that said
35 National Surety Company is not entitled to share in the distribution of said bankrupt's estate pro rata with the United States, as by Section 3466 Revised Statutes of the United States, it is specifically provided that whenever any person indebted to the United States is insolvent, the debts due the United States shall be first satisfied.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the bankruptcy law of 1898 and General Order XXVII.

Dated this 2nd day of April, 1918.

UNITED STATES,
By Benj. L. White,
Assistant United States Attorney.
Petitioner.

State of Missouri,
City of Saint Louis—ss.

I, Benjamin L. White, Assistant United States Attorney, within and for the Eastern Judicial District of Missouri, for and on behalf of the United States, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained, are true, according to the best of my knowledge, information and belief.

(Signed) BENJ. L. WHITE.
(Seal) Assistant United States Attorney.

Subscribed and sworn to before me this 2nd day of April, 1918.

(Signed) W. W. NALL,
Clerk of the United States District Court,
Eastern Division of the Eastern Judicial
District of Missouri.

In re Bald Eagle Mining Company, a corporation, Bankrupt.

Minutes of Orders of Referee of March 25, 1918.

(Motion of National Surety Company for leave to amend its claim for $3000.00, sustained, and claimant accorded like priority as the United States, etc.)

March 25,

Hearing on motion of National Surety Company for leave to amend its claim for $3,000.00, heretofore allowed as general claim against the bankrupt; motion of claimant sus-

tained and claimant accorded like priority as the United States; claimants claim to share in distribution

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36 (Motion of National Surety Company for leave to amend its claim for $150.00, sustained, and claimant accorded like priority as the United States, etc.)

March 25,

of estate pro-rate with the United States.

Hearing on motion of National Surety Company for leave to amend its claim for $150.00, heretofore allowed as general claim against the bankrupt; motion of claimant sustained and claimant accorded like priority as the United States; claimant's claim to share in distribution of estate pro-rata with the United States.

(Petition for Review of Order of Referee on Claim of National Surety Company, for $150.00.)

To Honorable Walter D. Coles, Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is a creditor of said Bald Eagle Mining Company, the above named bankrupt, and that its claim has been allowed herein and accorded priority under the law of the United States, and particularly under Section 3466 of the Revised Statutes of the United States.

That on the 25th day of March, A. D. 1918, an order, a copy of which is hereto annexed, was made and entered herein.

That such order was and is erroneous in that, allowing the prayer of the National Surety Company's petition to amend its Proof of Claim of One Hundred and Fifty Dollars ($150.00) against said Bald Eagle Company, bankrupt, by according to its said claim priority was an attempted novation and was not in legal effect, an order allowing an amendment of said National Surety Company's Proof of Claim, but was, in legal effect, allowing a new and different claim by said National Surety Company against said bankrupt which could not lawfully be allowed in favor of said National Surety Company after the 28th day of November, 1917, said Bald Eagle
37 Mining Company having been adjudicated a bankrupt on the 29th day of November, 1916.

That such order was and is erroneous, in that said sum of One Hundred and Fifty Dollars ($150.00) referred to in

the claim of said National Surety Company, has never been paid by said National Surety Company to the United States, and is therefore not eligible to [subregation] and priority as provided by Section 3468 of the Revised Statutes of the United States.

That said order was and is erroneous in that said National Surety Company is not entitled to share in the distribution of said bankrupt's estate pro rata with the United States, as by Section 3466, Revised Statutes of the United States, it is specifically provided that whenever any person indebted to the United States is insolvent, the debts due the United States shall be first satisfied.

Dated this 2nd day of April, 1918.

UNITED STATES
By Benj. L. White,
Assistant United States Attorney,
Petitioner.

State of Missouri,
City of Saint Louis—ss.

I, Benjamin L. White, Assistant United States Attorney, within and for the Eastern Judicial District of Missouri, for and on behalf of the United States, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained, are true, according to the best of my knowledge, information and belief.

(Signed) BENJ. L. WHITE.
(Seal) Assistant United States Attorney.

Subscribed and sworn to before me this 2nd day of April, 1918.

(Signed) W. W. NALL,
Clerk of the United States District Court,
Eastern Division of the Eastern Judicial
District of Missouri.

In re Bald Eagle Mining Company, a corporation, Bankrupt.

Minutes of Orders of Referee of March 25, 1918.

(Motion of National Surety Company for leave to amend its claim for $3000.00, sustained, and claimant accorded like priority as the United States, etc.)

March 25,

38 Hearing on motion of National Surety Company for leave to amend its claim for $3,000.00, heretofore allowed as general claim against the bankrupt; mo-

tion of claimant sustained and claimant accorded like priority as the United States; claimant's claim to share in distribution of estate pro-rata with the United States.

(Motion of National Surety Company for leave to amend its claim for $150.00, sustained, and claimant accorded like priority as the United States, etc.)

March 25,

Hearing on motion of National Surety Company for leave to amend its claim for $150.00, heretofore allowed as general claim against the bankrupt; motion of claimant sustained and claimant accorded like priority as the United States; claimant's claim to share in distribution of estate pro-rata with the United States.

Endorsed: Filed in the District Court on May 1, 1918.

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39 (Memorandum Opinion of the District Court.)

Dyer, J.

This matter is before the Court on a certificate of Walter D. Coles, Esq., Referee in Bankruptcy.

The facts in the case are undisputed and are fully set forth in the Referee's report, to which reference is here made.

Briefly the facts are that the Bald Eagle Mining Company (the bankrupt) entered into a contract with the United States Government to furnish to it certain coal at certain prices and within a certain time.

To secure the performance of said contract by the said Bald Eagle Mining Company a bond was given in the penal sum of three thousand dollars, with the National Surety Company as surety. The Mining Company failed to keep its contract and the United States was compelled to go into the open market for the amount of coal covered by the contract. This caused a loss to the United States of something over twelve thousand dollars.

Demand was made upon the Surety Company by the United States for the amount of the bond, to-wit: $3000.00. This was promptly paid. For this amount so paid the National Surety Company made claim against the estate of the Bald Eagle Mining Company (bankrupt) and the same was allowed by the Referee in Bankruptcy as a preferred claim along with the claim of the United States for more than $9000.00.

It is to this action of the Referee that the United States objects. Briefs have been filed by the United States Attorney and the Attorneys for the Surety Company.

The United States Attorney relies upon Section 3466 of the Revised [States]. That Section is as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

He then says "No person is entitled to have the payment of his claim prorated with that of the United States.

Section 3468 of the Revised Stats. of the United States is as follows:

"Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator or assigns, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity in his own home, for the recovery of all moneys paid thereon." (2 Fed. Stat. Ann. (2nd. Ed. page 223.)

It is insisted by counsel for the Surety Company that this Section gave full authority to the Referee to make the allowance in favor of the Surety Company. With this contention of counsel for the Surety Company the Court fully agrees.

The conclusions reached and the orders made by the Referee are approved and in all things confirmed.

Endorsed: Filed in the District Court December 31, 1918.

41 (Order of the District Court, affirming Referee's Orders of March 25, 1918.)

In the Matter of Bald Eagle Mining Company, a corporation, Bankrupt, In Bankruptcy. No. 2879.

The Court having fully considered the question certified by the Referee in Bankruptcy upon the petitions of the United States for review of the orders entered March 25th, 1918 by the Referee allowing the claims of the National Surety Company with the same priority as that accorded to the claim of the United States, doth

Order, Adjudge and Decree that the said orders of the Referee be in all things approved and confirmed, and the petitions of the United States for review thereof denied and dismissed; to which ruling of the Court the United States excepts.

Memorandum opinion filed.

December 31st 118.

(Signed) DAVID P. DYER,
Judge.

Endorsed: Filed Dec. 31, 118. W. W. Nall, Clerk.

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42 (Clerk's Certificate to Transcript of Proceedings.)

United States of America,
Eastern Division of the Eastern Judicial
District of Missouri—ss.

I, Walter W. Nall, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the writing hereto annexed to be a true copy of the Certificate of Referee and attached papers, filed May 1, 1918,—Opinion of Court, filed December 31st, 1918,—and Order of Court of date of December 31, 1918,

In Case No. 2879.

In the Matter of Bald Eagle Mining Company, a corporation, Bankrupt, In Bankruptcy.

as fully as the same remain on file and of record in said matter in my office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court, at office in the City of St. Louis, in said District, this Tenth day of January in the year of our Lord nineteen hundred nineteen.

Seal
U. S. Dist. Court
East. Division
East. Judicial Dis.
of Mo.

W. W. NALL,
Clerk of said Court.
By Otto O. Fickeissen, D. C.

Filed Jan 16 1919 E. E. Koch Clerk.

45 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

Appearance of Counsel for Petitioner.

United States Circuit Court of Appeals, Eighth Circuit.

No. 201, Original.

United States, petitioner, vs. National Surety Company.

The clerk will enter my appearance as counsel for the petitioner.

BENJ. L. WHITE.

(Endorsed): Filed in U. S. Circuit Court of Appeals Mar. 21, 1919.

Appearance of Counsel for Respondent.

The clerk will enter my appearance as counsel for the respondent.

S. W. FORDYCE, Jr.
JOHN H. HOLLIDAY.
THOMAS W. WHITE.
W. H. WOODWARD.
LUCIUS W. ROBB.

(Endorsed): Filed in U. S. Circuit Court of Appeals Mar. 29, 1919.

46 *Order of submission.*

May Term, 1919, Wednesday, May 28, 1919.

No. 201, Original.

United States, petitioner, vs. National Surety Company, on petition to revise,

and

United States, appellant, vs. National Surety Company.

No. 5362.

Appeal from the District Court of the United States for the Eastern District of Missouri.

These causes, Nos. 201, original, and 5362, having been called for hearing in their regular order, the same were submitted on the brief filed in behalf of the petitioner and appellant and argued by Mr. Frank E. Williams for the respondent and appellee.

Thereupon, these causes were submitted to the court on the printed record, the transcript of record from said District Court and the briefs of counsel filed herein.

47 *Opinion.*

United States Circuit Court of Appeals, Eighth Circuit.

No. 201, Original.—December Term, A. D. 1919.

United States, petitioner, vs. National Surety Company, respondent.

Petition to revise order of the District Court of the United States for the Eastern District of Missouri.

Mr. W. L. Hensley, United States Attorney, and Mr. Benjamin L. White, Assistant United States Attorney, submitted brief for petitioner.

Mr. Frank E. Williams (Mr. S. W. Fordyce, jr., Mr. John H. Holliday, Mr. Thomas W. White, and Mr. Lucius W. Robb were with him on the brief), for respondent.

Before Hook and Carland, Circuit Judges, and Youmans, District Judge.

CARLAND, Circuit Judge, delivered the opinion of the court.

The petitioner by this proceeding seeks to have revised in matter of law an order of the District Court made December 31, 1918, confirming certain orders of the referee with reference to the claims of respondent against the estate of the Bald Eagle Mining Co., a bankrupt. The undisputed facts are as follows. On November 3, 1917, the respondent filed two claims against

48 the estate of the bankrupt for $3,000 and $150, respectively, which were allowed on the same day. On the 12th day of December, 1917, the United States filed a claim against the estate of the bankrupt for $9,912.84, which was allowed on the same day, and it was further ordered and directed that said claim be accorded priority over all other claims except those for wages and taxes. On March 12, 1918, the respondent filed a motion with the referee for leave to amend its two claims above mentioned by claiming priority for the same equal to that of the United States. The motion was granted on March 25, 1918. The United States filed a petition for review. The proceedings were duly certified, and after a hearing the District Court affirmed the order of the referee. It is this last named order which the United States seeks to have revised. The claim of the United States against the bankrupt was for damages suffered by them by reason of the failure of the bankrupt to perform its contract with the Government for supplying coal at Jefferson Barracks, Missouri, after deducting from said damages payments made by the respondent. The claim of the respondent for $3,000 was for money paid the United States by reason of its being surety on the bond of the bankrupt given to

secure the faithful performance of the coal contract above mentioned. The claim of respondent for $150 was for money paid the United States by respondent by reason of its being surety upon the bond of the bankrupt to secure the faithful performance of a contract to furnish bituminous lump coal to the United States Arsenal at St. Louis, Missouri. In each instance the amount paid was the full amount of the bond. The question for decision is as follows: Has the United States and the respondent an equal priority to the extent of the amount of their respective claims or has the United States exclusive priority as against all other claims until the full amount of its claim is paid? The applicable statutes are as follows:

Section 3466, R. S. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof,

or in which the estate and effects of an absconding, concealed,
49 or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3468 R. S. "Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

There is no question as to the meaning of sec. 3466. In the cases specified in said section, the United States has beyond question undoubted priority. When we come to section 3468, it is claimed by counsel for the United States that it must be so construed as to be of no force or effect except in cases where the United States has no claim whatever to be satisfied, and it appearing in the present case that the United States has a claim against the estate of the bankrupt, said section is inoperative. The ground of this contention is that the priority granted by section 3466, still attaches to the claim of the United States even as against the claims of respondent and that no priority exists in favor of respondent until the claim of the United States is fully paid. If this contention is sound we must read into section 3468, a proviso at the end of the last clause but one of the section, reading as follows, "provided that said Unied States has no claim against the insolvent estate."

We do not think we have any authority to interpolate such a proviso. We are of the opinion that while the general priority of the United States is undoubted, it is within the power of Congress to qualify or limit this priority, and that by the enactment of section 3468, it has been provided that in the cases mentioned in said section, the prority of the United States has been transferred to a surety who has paid the penalty of a bond in full, notwithstanding the latter still has a claim against the insolvent. It is claimed
50 by counsel for the United States that the surety in a case like the one at bar has no priority unless he pays all of the debt or debts due from the bankrupt to the United States. The section which we are endeavoring to construe does not provide that the surety shall pay all the debt or debts due from the bankrupt estate to the United States but only the money due upon such bond and it is conceded that the respondent did this. If it paid all the debt for which it was obligated as surety. If it should pay any more it would be a mere volunteer and not entitled to the right of subrogation as to the excess. It is not material if the contention of counsel for the United States is right whether the claim of the United States arises out of the same transaction as that of respondent or not. It is contended and it is no doubt the law that the priority of the sovereign exists in full force and vigor unless qualified by express words. But we have express words in section 3468. We think that section 3466 and 3468 should be construed together so as to give both force and effect, the United States retaining its priority as to the balance of its claims against the bankrupt estate and the respondent standing on a level with them as to its claim. No case has been cited nor have we found one deciding the question involved. The cases cited simply establish the proposition that where the title of the United States and the citizen concur, the title of the United States except so far as the legislature has thought fit to interfere shall be preferred, and that where the principal in any bond given to the United States is insolvent and any surety on the bond pays to the United States the money due upon such bond, such surety shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent as is secured to the United States. These rights are all given by the sections quoted and citation of other authority is unnecessary. Respondent's rights must be determined by section 3468. What its rights would be under the equitable doctrine of subrogation is not involved. The unreasonableness of the contention of counsel of the United States is made to appear when we consider a case where different bonds have been given by an insolvent to the United States with different sureties. One surety pays the full penalty of the bond on which he is liable but he can have no priority until he has paid all the other bonds on which he is not liable.

51 We do not think the application to amend the claims of respondent by claiming priority constituted the filing of new claims after the year allowed by law. Appeal No. 5362 is dismissed

Judgment

Affirmed.

Filed December 10, 1919.

Hook, Circuit Judge, dissenting.

Sec. 3466 of the Revised Statutes, which provides that "whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied," is a statutory adoption for this country of a public policy which has prevailed in England from a very early day. The right is one of preference in the sovereign to the claims of all private persons, and is of universal application. No other statute should be construed to impair or lessen it unless the intention to do so is clearly manifested.

With the above in mind let us look at sec. 3468, R. S., which provides that "whenever the principal in any bond given to the United States is insolvent * * * and * * * any surety on the bond * * * pays to the United States the money due upon such bond, such surety * * * shall have the like priority * * *." This is no more than a statutory declaration of the equitable doctrine of subrogation in favor of sureties. See United States v. Ryder, 110 U. S. 729. There is nothing in the language employed or in the decisions of the courts applying it to indicate that it should be given a more enlarged construction. In the case of private rights subrogation is not allowed to work loss or injury to a lien or preferred creditor whose claim has not been wholly discharged, although the surety may have paid in full his obligation for part of it. See National Bank of Commerce v. Rockefeller, 98 C. C. A. 8, 174 Fed. 22, by this court. Much less should it be allowed to impair or lessen the sovereign preferential right of the Government. In Reg. v. O'Callaghan, 1 Ir. Eq. 439, it was held that the surety of a person indebted to the Government who pays the indebtedness does not succeed to the Government's right of priority if there be a further amount owing it, though on a different account. My brothers say that such

52 a construction of sec. 3468 is contrary to its express language and would deprive it of efficacy. It might be said that a contrary construction lessens materially the unqualified language of sec. 3466. I think, however, both sections may be construed to give each full effect according to its terms. That should always be done if possible. The Government's priority by sec. 3466 is over all private claims. The right given by sec. 3468 to the surety who pays his obligation in full is a "like priority," that is to say, a priority over all private claims. But there is nothing in this to imply, and it does not follow, that the surety is thereby raised to an equal or pro rata status with the Government as regards an unpaid demand it holds against the common debtor or his estate whether on the same or another

account. Statutes declaratory of old principles of public policy or of the common law should receive the old constructions, and in that way apparent inconsistencies may be avoided. I think the order of the trial court should be reversed.

Filed December 10, 1919.

53 *Decree.*

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1919, Wednesday, December 10, 1919.

No. 201, Original.

United States, petitioner, vs. National Surety Company, on petition to revise.

This matter came on to be heard on the petition to revise and exhibits thereto, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that said petition to revise be, and the same is hereby, denied, and that the order and decree of the District Court of the United States for the Eastern District of Missouri, entered on the 31st day of December, A. D. 1918, in the matter of Bald Eagle Mining Company, a corporation, bankrupt, in bankruptcy, No. 2879, which said order and decree approved and confirmed the orders of the referee allowing the claims of the National Surety Company with the same priority as that accorded to the claim of the United States, be, and the same is hereby, in all respects approved and confirmed, and that a certified copy of this decree be transmitted to the said District Court, as provided by the rules of this court.

It is further ordered, adjudged, and decreed by this court, that the petition to revise be, and the same is hereby, dismissed without costs to either party in this court.

December 10, 1919.

54 *Clerk's certificate.*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the petition to revise with transcript of certain proceedings in the District Court of the United States for the Eastern District of Missouri, in the matter of Bald Eagle Mining Company, a corporation, bankrupt, in bankruptcy, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries and proceedings, in-

cluding the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein United States was petitioner, and National Surety Company was respondent, No. 201, Original, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the tenth day of February, A. D. 1920, a certified copy of the decree of this court was sent to the clerk of the said District Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this eighteenth day of February, A. D. 1920.

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals
For the Eighth Circuit.

55 In the Supreme Court of the United States.

October Term, 1919.

United States, petitioner, vs. National Surety Company.
Nos. 779 and 780.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, to the writs of certiorari granted therein.

ALEX. C. KING,
Solicitor General.

S. W. FORDYCE, JOHN H. HOLLIDAY & THOS. W. WHITE,
Counsel for Respondent.

(Endorsed:) No. 201, Original. United States, petitioner, vs. National Surety Company. No. 5362. United States, appellant, vs. National Surety Company. Stipulation as to return to writs of certiorari.. Filed May 12, 1920. E. E. Koch, clerk.

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The United States is petitioner, and National Surety Com-

pany is respondent, No. 201, Original, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to revise the order of the District Court of the United States for the Eastern District of Missouri, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the
57 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

58 *Return to writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of United States, petitioner, vs. National Surety Company, No. 201, Original, is a full, true, and complete transcript of all the peadings, proceedings, and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals, at office in the city of St. Paul, Minnesota, in the Eighth Circuit, this eighteenth day of May, A. D. 1920.

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) File No. 27534. Supreme Court of the United States, No. 779, October Term, 1919. The United States vs. National Surety Company. Writ of certiorari.

(Stamped:) Office of the clerk Supreme Court U. S. Received May 21, 1920.

(Stamped:) Filed May 12, 1920. E. E. Koch, clerk.

59 (Endorsed:) File No. 27534. Supreme Court U. S. October Term, 1920. Term No. 271. The United States, Petitioner, vs. National Surety Co. Writ of certiorari and return. Filed May 21, 1920.

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SUP

ON WR

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 272.

THE UNITED STATES, PETITIONER,

vs.

NATIONAL SURETY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petition for Certiorari filed March 8, 1920.
Certiorari and Return filed May 21, 1920.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 272.

THE UNITED STATES, PETITIONER,

VS.

NATIONAL SURETY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1919, of said court, before the Honorable William C. Hook and the Honorable John E. Carland, Circuit Judges, and the Honorable Frank A. Youmans, District Judge.

Attest:

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the sixteenth day of January, A. D. 1919, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the United States was appellant and National Surety Company was appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 (Citation and Acknowledgment of Service.)

In the United States District Court for the Eastern Division of the Eastern District of Missouri.

In the Matter of Bald Eagle Mining Company, Bankrupt.

No. 2879. United States, Appellant, vs. National Surety Company, Appellee.

To the National Surety Company—Greeting:

You are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Eighth Circuit in the City of St. Louis, sixty days from and after the day this citation bears date, pursuant to the appeal duly obtained and filed in the Clerk's Office of the District Court of the United States for the Eastern Division of the Eastern District of Missouri, wherein you are appellee and the United States is the appellant, to show cause, if any there be, why the order and decree in said appeal mentioned should not be reversed and corrected and why speedy justice should not be done to the parties in that behalf and to do and receive that may appertain to justice to be done in the premises.

Witness the Honorable United States Judge for the Eastern Division of the Eastern District of Missouri on the 9th day of January, 1919.

DAVID P. DYER,
Judge.

Service of above citation and receipt of copy of same is hereby acknowledged this 9th day of January, 1919.

FORDYCE, HALLIDAY & WHITE,
Attorneys for Appellee.

2 Endorsed: Filed in the District Court on January 9, 1919.

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

In the District Court of the United States, within and for the Eastern Division of the Eastern Judicial District of Missouri.

Be It Remembered, that heretofore, to-wit on the 9th day of January, 1919, there was filed in the office of the Clerk of the District Court of the United States, a certain election and praecipe for transcript, In the Matter of Bald Eagle Mining Company, Bankrupt, In Bankruptcy, No. 2879, in words and figures, as follows, to-wit:

Election as to Printing and Praecipe for Transcript.

In the Matter of Bald Eagle Mining Company,
Bankrupt,

United States, Appellant,
No. 2879. vs.
National Surety Company, Appellee.

In the matter of the Appeal of United States, from the Order and Decree of Court Confirming the Report of the Referee, in allowing, on the 25th day of March, 1918, on motion filed by said National Surety Company on the 12th day of March, 1918, said National Surety Company to amend its claim of $3000.00, theretofore, on the 3rd day of November, 1917, allowed as a general claim against said bankrupt estate, so as to claim and receive the same priority as the claim of the United States and to share in the distribution of said bankrupt estate pro rata with the United States, and by allowing said National Surety Company, upon its said amended claim, like priority as the United States and the right to share in the distribution of said bankrupt estate pro rata with the United States, and allowing, on the 25th day of March, 1918, on motion filed by said National Surety Company on the 12th day of March, 1918, said National Surety Company to amend its claim of $150.00, theretofore, on the 3rd day of November, 1917, allowed as a general claim against said bankrupt estate, so as to claim and receive the same priority as the claim of the United States and to share in the distribution of said bankrupt estate pro rata with the United States, and by allowing said National Surety Company, up-

5 on its said amended claim, like priority as the United States and the right to share in the distribution of said bankrupt estate pro rata with the United States.

To the Clerk of the above-entitled Court:

You will please prepare a typewritten transcript of the record in the above entitled matter to be printed under the supervision of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, and include in such transcript the following and no other papers:

Assignment of Errors,

Petition for Appeal,

Order Allowing Appeal,

Stipulation filed January 9th, 1919, and

This election and praecipee.

BENJ. L. WHITE,
Assistant United States Attorney,
Attorney for Appellant.

(Endorsed: "Filed Jan. 9, 1919. W. W. Nall, Clerk.")

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6 (Assignment of Errors.)

Now comes the United States, complainant, and files the following assignment of errors, on appeal from an Order and Decree of the United States District Court, for the Eastern Division of the Eastern District of Missouri, made and entered on the 31st day of December, 1918.

First: The Court erred in approving and confirming the order of Walter D. Coles, Referee in Bankruptcy within and for the Eastern Division of the Eastern District of Missouri, allowing, on the 25th day of March, 1918, on motion [ofiled] by said National Surety Company on the 12th day of March, 1918, said National Surety Company to amend its claim of $3000.00, theretofore, on the 3rd day of November, 1917, allowed as a general claim against said bankrupt estate, so as to claim and receive the same priority as the claim of the United States and to share in the distribution of said Bankrupt estate pro rata with the United States, and by allowing said National Surety Company, upon its said amended claim, like priority as the United States and the right to share in the distribution of said bankrupt estate pro rata with the United States, and allowing, on the 25th day of March, 1918,

7 on motion filed by said National Surety Company on the 12th day of March, 1918, said National Surety Company to amend its claim of $150.00, theretofore, on the 3rd day of November, 1917, allowed as a general claim

against said bankrupt estate, so as to claim and receive the same priority as the claim of the United States and to share in the distribution of said bankrupt estate pro rata with the United States, and by allowing said National Surety Company, upon its said amended claim, like priority as the United States and the right to share in the distribution of said bankrupt estate pro rata with the United States.

Second: The Court erred in approving and confirming the order of Walter D. Coles, Referee in Bankruptcy within and for the Eastern Division of the Eastern District of Missouri, according to said claims of said National Surety Company the same priority as the claim of the United States and ordering that said claims of said National Surety Company share in the distribution of said bankrupt estate pro rata with the United States and in not directing said Referee to change and reform his said orders accordingly, and to deny said National Surety Company's claims the same priority as that of the United States and to deny the right of said National Surety Company's claims to share pro rata in the distribution of said bankrupt estate with the United States.

Third: The Court erred in not holding and adjudging that said National Surety Company, having, on the 3rd day of November, 1917, filed and had allowed its said claims as general claims against said bankrupt estate it could not, by motion, filed on the 12th day of March, 1918, (more than one year after the original claim had been filed and allowed), have said claims amended by making them preferred claims and entitled to the same priority as claims of the United States, such action by said National Surety Company being in effect not an amendment of its said original claims but a substitution of other and different claims, and in not directing and ordering said Referee to change and reform his said order accordingly, and to deny said National Surety Company's claims the same priority as the claim of the United States and to deny to said National Surety Company's claims the right to share pro rata with the United States in the distribution of said bankrupt estate.

8

BENJ. L. WHITE,
Assistant United States Attorney,
For Appellant.

(Endorsed: "Filed Jan. 9, 1919. W. W. Nall, Clerk.")

9 Petition for and Order Allowing Appeal of United States from Order and Decree of United States District Court, of December 31, 1918, Approving and Confirming Orders of Walter D. Coles, Referee in Bankruptcy, for Eastern Division of Eastern District of Missouri, Made on the 25th day of March, 1918.

To the Honorable Judge of the United States District Court for the Eastern Division, Eastern District of Missouri:

The United States, your petitioner, conceiving itself aggrieved by the final order and decree entered on the 31st day of December, 1918, in the above entitled proceeding dismissing the petitioner's petition for review of the referee's orders, allowing, on the 25th day of March, 1918, on motion filed by said National Surety Company on the 12th day of March, 1918, said National Surety Company to amend its claim of $3000.00, theretofore, on the third day of November, 1917, allowed as a general claim against said bankrupt estate, so as to claim and receive the same priority as the claim of the United States and to share in the distribution of said bankrupt estate pro rata with the United States, and by allowing said National Surety Company, upon its said amended claim, like priority as the United States and the right to share in the distribution of said bankrupt estate pro rata with the United States, and allowing, on the 25th
10 day of March, 1918, on motion filed by said National Surety Company on the 12th day of March, 1918, said National Surety Company to amend its claim of $150.00, theretofore, on the 3rd day of November, 1917, allowed as a general claim against said bankrupt estate, so as to claim and receive the same priority as the claim of the United States and to share in the distribution of said bankrupt estate pro rata with the United States, and by allowing said National Surety Company, upon its said amended claim, like priority as the United States and the right to share in the distribution of said bankrupt estate pro rata with the United States, does hereby petition for an appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit, and prays that its appeal may be allowed and a citation granted, directed to the National Surety Company, commanding it to appear before the United States Circuit Court of Appeals for the Eighth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record proceedings, and evidence in said proceedings duly authenticated may be trans-

mitted to the United States Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES, PETITIONER
By Benj. L. White, Assistant United States Attorney, For Appellant.

The foregoing appeal is hereby allowed this 9th day of January, 1919.

(Signed) DAVID P. DYER,
District Judge.

(Endorsed: "Filed Jan. 9, 1919. W. W. Nall, Clerk.")

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11 (Stipulation as to Record, etc.)

Appeal of United States from the Order and Decree of United States District Court, December 31st, 1918, approving and confirming an order of Referee in Bankruptcy allowing, on the 25th day of March, 1918, on motion filed by said National Surety Company on the 12th day of March, 1918, said National Surety Company to amend its claim of $3000.00, theretofore, on the 3rd day of November, 1917, allowed as a general claim against said bankrupt estate, so as to claim and receive the same priority as the claim of the United States and to share in the distribution of said bankrupt estate pro rata with the United States, and by allowing said National Surety Company, upon its said amended claim, like priority as the United States and the right to share in the distribution of said bankrupt estate pro rata with the United States, and allowing, on the 25th day of March, 1918, on motion filed by said National Surety Company on the 12th day of March, 1918, said National Surety Company to amend its claim for $150.00, theretofore, on the 3rd day of November, 1917, allowed as a general claim against said bankrupt estate, so as to claim and receive the same priority as the claim of the United States and to share in the distribution of said bankrupt estate pro rata with the United States, and by allowing said National Surety Company, upon its said amended claim, like priority as the United States and the right to share in the distribution of said bankrupt estate pro rata with the United States.

12 It is hereby stipulated by and between counsel for appellant and counsel for appellee that on this appeal, merely the appeal papers and this stipulation may be printed.

It is further stipulated that if the United States Court of Appeals holds an appeal is the proper method to obtain a

review in this case, the printed record, in this same matter on the petition to revise, filed by appellant, may be treated as part of the record on this appeal.

BENJ. L. WHITE,
Assistant United States Attorney,
Attorney for Appellant.

FORDYCE, HOLLIDAY & WHITE,
Attorneys for Appellee.

(Endorsed: "Filed Jan. 9, 1919. W. W. Nall, Clerk.")

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13 (Clerk's Certificate to Transcript.)

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

I, W. W. Nall, Clerk of the District Court of the United States, within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings, in cause No. 2879, of In the Matter of Bald Eagle Mining Company, Bankrupt, In Bankruptcy, (save as restricted by praecipe for transcript hereinbefore set [forty]), as fully as the same remains on file and of record in said cause in my office; and that the original [citztion] is hereto attached and herewith returned.

Seal
U. S. District Court,
Eastern Division
of the
Eastern Judicial
District
of Missouri.

In Witness Whereof, I hereunto set my hand and affix the seal of said District Court, at office in the City of St. Louis, Missouri, this 16th day of January, A. D., 1919.

W. W. NALL,
Clerk of said Court.
By Otto O. Fickeissen,
Deputy Clerk.

Filed Jan. 16, 1919. E. E. Koch, Clerk.

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8 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of counsel for appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

UNITED STATES, APPELLANT. *vs.* NATIONAL SURETY COMPANY.	No. 5362.

The clerk will enter my appearance as counsel for the appellant.

BENJ. L. WHITE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 21, 1919.

(Appearance of counsel for appellee.)

The clerk will enter my appearance as counsel for the appellee.

S. W. FORDYCE, Jr.,
JOHN H. HOLLIDAY,
THOMAS W. WHITE,
W. H. WOODWARD,
LUCIUS W. ROBB.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 29, 1919.

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9 (Order of submission.)

MAY TERM, 1919.
Wednesday, May 28, 1919.

UNITED STATES, PETITIONER. *vs.* NATIONAL SURETY COMPANY.	No. 201, Original.

On Petition to Revise.
and

UNITED STATES, APPELLANT. *vs.* NATIONAL SURETY COMPANY.	No. 5362.

Appeal from the District Court of the United States for the Eastern District of Missouri.

These causes, Nos. 201, Original, and 5362, having been called for hearing in their regular order, the same were submitted on the brief

filed in behalf of the petitioner and appellant and argued by Mr. Frank E. Williams for the respondent and appellee.

Thereupon, these causes were submitted to the court on the printed record, the transcript of record from said district court and the briefs of counsel filed herein.

(Opinion.)

The opinion of the United States Circuit Court of Appeals filed December 10, 1919, in the case of United States, Petitioner, *vs.* National Surety Company, No. 201, Original, which also disposes of the appeal in this cause, is omitted from this transcript for the reason that a copy thereof is included in the transcript this date prepared in said cause No. 201, Original.

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10 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

DECEMBER TERM, 1919.
Wednesday, December 10, 1919,

UNITED STATES, APPELLANT, *vs.* NATIONAL SURETY COMPANY.	No. 5362.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the appeal from the order and decree of the said District Court in this cause be and the same is hereby dismissed without costs to either party in this court, on the ground that the questions of law involved in this appeal have been determined and decided in the cause on the petition to revise between the same parties hereto, No. 201, Original, in this court.

DECEMBER 10, 1919.

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11 (Clerk's certificate.)

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri, as prepared and printed

under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, except the opinion, had and filed in the United States Circuit Court of Appeals (except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), in a certain cause in said Circuit Court of Appeals wherein the United States was appellant and National Surety Company was appellee, No. 5362, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the tenth day of February, A. D. 1920, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the Eastern District of Missouri.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this eighteenth day of February, A. D. 1920.

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

12 In the Supreme Court of the United States, October term, 1919.

UNITED STATES, PETITIONER,
vs.
NATIONAL SURETY COMPANY.
} Nos. 779 & 780.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit to the writs of certiorari granted therein.

ALEX. C. KING,
Solicitor General.

S. W. FORDYCE,
JOHN H. HOLLIDAY,
THOS. W. WHITE,
Counsel for Respondent.

(Endorsed:) No. 201, Original. United States, Petitioner, *vs.* National Surety Company. No. 5362. United States, Appellant, *vs.* National Surety Company. Stipulation as to return to writs of certiorari. Filed May 12, 1920. E. E. Koch, clerk.

13 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable judges of the United States Circuit Court of Appeals for the Eighth Circuit, greeting:

Being informed that there is now pending before you a suit in which The United States is appellant and National Surety Company is appellee, No. 5362, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Eastern District of Missouri, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

14 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

15 (Return to writ.)

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of United States, appellant, vs. National Surety Company, No. 5362, is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals, at office in the city of St. Paul, Minnesota, in the Eighth Circuit, this eighteenth day of May, A. D. 1920.

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) File No. 27535. Supreme Court of the United States. No. 780, October term, 1919. The United States *vs.* National Surety Company. Office of the clerk. Received May 21, 1920. Supreme Court U. S. Writ of certiorari. Filed May 12, 1920. E. E. Koch, clerk.

(Indorsed on cover:) File No. 27535. Supreme Court U. S. October term, 1920. Term No. 272. The United States, petitioner, *vs.* National Surety Co. Writ of certiorari and return. Filed May 21, 1920.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, PETITIONER,
v.
NATIONAL SURETY COMPANY.
} Nos. —.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

The Solicitor General, on behalf of the United States, prays that writs of certiorari may issue to review two decrees of the Circuit Court of Appeals for the Eighth Circuit rendered in the above-entitled cause December 10, 1919, being No. 201, original, and No. 5362 in said court.

THE FACTS.

On November 29, 1916, the Bald Eagle Mining Company, a corporation, was adjudged a bankrupt. The National Surety Company, respondent herein, on November 3, 1917, filed with the referee two claims for $3,000 and $150, respectively, which were allowed as general claims. The sums represented payments made by it as surety to the United States of the amounts of two bonds securing the performance of contracts of the mining company to furnish coal at Jefferson Barracks, Missouri, and to the United States

Arsenal at St. Louis, Missouri, respectively, which contracts the bankrupt failed to perform.

On December 12, 1917, the United States filed with the referee its claim for $9,912.84, representing the loss incurred by it, after deducting the $3,000 paid by the surety company on account of the first-named bond, by reason of the default in performing the Jefferson Barracks coal contract. The referee allowed the claim as filed and ordered that it be accorded priority over all other claims against the bankrupt, with the exception of taxes and wages.

The surety company on March 12, 1918, filed with the referee motions to amend its claims for $3,000 and $150, asserting that under Revised Statutes, section 3468, they were entitled to the same preference accorded that of the United States. Said motions were granted and the referee ordered that the claims of the surety company should share in the distribution of the assets of the insolvent *pro rata* with the claim of the Government. (The assets of the estate available for distribution after payment of administration expenses were insufficient to pay in full the claims of the United States and the surety company.)

Thereafter the Government filed petitions for a review of said orders by the District Court for the Eastern District of Missouri. Said District Court affirmed said referee's orders, and appeal was taken by the Government to the United States Circuit Court of Appeals for the Eighth Circuit (No. 5362). A petition was also filed therein for revision of the orders and judgment complained of.

(No. 201, original.) The Circuit Court of Appeals (Judge Hook dissenting) on December 10, 1919, affirmed the decree of the District Court.

THE STATUTES INVOLVED.

The material part of section 3466, Revised Statutes, reads:

> Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied; * * *

The pertinent portion of section 3468, Revised Statutes, is as follows:

> Whenever the principal in any bond given to the United States is insolvent, * * * and * * * any surety on the bond * * * pays to the United States the money due upon such bond, such surety * * * shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent * * * principal as is secured to the United States; * * *

THE QUESTION INVOLVED.

Is a surety who has paid to the United States the full amount of his bond, which, however, is less than the amount due the Government from the principal, a bankrupt, entitled to share *pro rata* with it (the United States) in the distribution of the assets of the bankrupt debtor, or is the claim of the United States superior and entitled to priority of payment?

REASONS FOR THE ALLOWANCE OF THE WRIT.

It is urged that the writs of certiorari should issue for the following reasons:

(1) This is the first time that the question herein involved has ever been presented to this Honorable Court.

(2) The question herein, decided below adversely to the Government by a divided court, is one which will undoubtedly arise very frequently in the future owing to the large number of contracts into which the Government is entering with private parties and for which surety bonds are given to secure the faithful performance thereof, and its correct settlement is of the greatest importance to the public business.

Wherefore it is respectfully prayed that this petition for writs of certiorari be granted.

ALEX. C. KING,
Solicitor General.
T. J. SPELLACY,
Assistant Attorney General.

MARCH, 1920.

BRIEF IN SUPPORT OF THE PETITION.

FIRST.

A surety is not subrogated to the rights of the United States against the insolvent debtor until the claim of the Government is satisfied in full.

Revised Statutes, section 3466, quoted supra, is merely declaratory of the old common-law principle

that debts of the sovereign are paramount and entitled to priority of payment over claims of private creditors. While it is conceded that section 3466 has been modified by the Bankruptcy Act of 1898 (sec. 64) to the extent that debts due the United States other than for taxes are not now of the first rank (*Guarantee Title & Trust Company* v. *Title Guaranty & Surety Company*, 224 U. S. 152) but stand sixth in order of liquidation, they are nevertheless still preferred claims and superior to those of the general creditor; and so far as the merits of this case go section 3466 is in full force and effect.

The ancient prerogative of the sovereign mentioned above depended upon the principle which determined "a preference in favor of the Crown in all cases and touching all rights of what kind soever where the Crown's and the subject's rights concur and so come into competition." This principle has recently been declared by the Privy Council of England never to have been questioned as a rule of law since the days of Lord Coke and to be of universal application except in so far as it has been modified by the legislature. (*New South Wales Taxation Commission* v. *Palmer*, 1907, A. C. 179.)

The doctrine has long been recognized in our own country and is one of the fundamental principles in our system of law. As this court said in the case of *Dollar Savings Bank* v. *United States*, 19 Wall., 227, 239:

> It may be considered as settled that so much of the royal prerogatives as belonged to the

> King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution.

Speaking of provisions of the acts of March 3, 1797, and March 2, 1799, substantially identical with the provisions of section 3466, Revised Statutes, this court said in *United States* v. *Bank of North Carolina*, 6 Peters, 29, 35:

> The same policy which governed in the case of the royal prerogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving them a strict and narrow interpretation.

To permit the surety company in the instant case to be subrogated *pro tanto* to the rights of the United States against the estate of the bankrupt would defeat the express declaration of section 3466 that the debts due to the United States shall be first satisfied out of the assets of an insolvent estate. If the surety were so subrogated as to be placed upon a footing of equality with the United States, since the assets of the bankrupt's estate are insufficient to pay both claims in full the United States would suffer a reduction in the amount it would be entitled to in the distribution of such assets. To illustrate: In this case the assets of the bankrupt are $8,253.36. The claim of the United States is $9,912.84; that of the surety is $3,150. If the surety company is permitted to share *pro rata* in the distribution of the assets, it

will receive $1,990.23, to the loss and prejudice of the United States. To sustain the claim of the surety company is, therefore, not only contrary to the express declaration of Revised Statutes, section 3466, declaratory of the common law principle of the superiority of the sovereign's debts, but also of the well-settled equitable doctrine that the debt owing to the creditor must be satisfied in full before the surety can make any claim of subrogation to the rights and remedies of such creditor. As was stated in the case of *Receivers of New Jersey Midland Railway Company* v. *Wortendyke*, 27 N. J. Eq. 658, 661:

> The right of subrogation can not be enforced until the whole debt is paid; and until the creditor be wholly satisfied, there ought and can not be any interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim.

In the case of *Willingham* v. *Ohio Valley Banking & Trust Co.*, 22 Ky. Law Rep. 158, 56 S. W. 706, it was held that where a debtor pledged policies of life insurance to secure several debts which he owed the pledgee, a surety on one of the debts who had made payment thereof is not entitled to any part of the collateral security until all of the debts are paid, in the absence of agreement that each of the debts was to receive its *pro rata* of the security.

SECOND.

The right of a surety to be subrogated to the priority of his creditor is a right which exists against all creditors of the principal debtor *other than the obligee of the surety.*

Just as Revised Statutes, section 3466, is a statutory reenactment of the common law prerogative, so the above-quoted portion of Revised Statutes, section 3468, is a reenactment of the equitable rule of subrogation recognized in the law of principal and surety which also declared that a surety who has paid the debt of his principal to the sovereign is entitled to the sovereign's priority in the administration of his principal's estate. (*Manisty* v. *Church*, 39 Ch. D., 174; *Orem's Executrix* v. *Wrightson*, 51 Md., 34; *Richeson* v. *Crawford*, 94 Ill., 165; *In re Ryder*, 110 U. S., 729, 733.) The section should be construed in the light of the recognized principle that subrogation does not prevail against the creditor of the surety as to an unpaid part of the debt secured by the surety's obligation. As has been contended, under this section so construed a surety is not entitled to be subrogated to the rights of the creditor against the principal debtor until the creditor has been paid in full the debt on which the surety is liable in part, and this rule applies though the surety has paid all that he has agreed to pay. (*United States Fidelity & Guarantee Company* v. *United States Bank & Trust Company*, 228 Fed., 448.) As stated in Sheldon on Subrogation (2d ed.), section 127:

> Even if a surety is liable for only a part of the debt, and pays that part for which he is liable, he can not be subrogated to the securities held by the creditor for the debt until the whole demand of the creditor is satisfied.

The reason for this rule is that subrogation is a creature of equity and will never be allowed to the prejudice of the creditor. To hold otherwise is to defeat one of the objects of calling for a surety, i. e., to further secure the debt. That the United States would be prejudiced in the instant case if the surety company were subrogated to its rights has been hereinbefore demonstrated.

THIRD.

Sections 3466 and 3468, Revised Statutes, are in pari materia and must, if possible, be construed so as not to conflict with each other.

To sustain its claim that it should be allowed to share in the distribution of the bankrupt estate *pro rata* with the Government, the surety company relies upon Revised Statutes, section 3468, quoted supra, providing that in case of the insolvency of the principal on a bond given to the United States, the surety paying it shall have the like priority for the recovery of the moneys out of the estate of the bankrupt accorded the United States. The construction put upon that section by the surety company and the court below brings it squarely in conflict with section 3466, Revised Statutes. The latter section was originally enacted as section 5 of the act

of March 3, 1797 (1 Stat. 512, 515), the material part of which reads as follows:

> That where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, * * * the debt due to the United States shall be first satisfied, * * *

The section was reenacted as ~~part~~ of section 65 of the act of March 2, 1799 (1 Stat. 627, 676), and reads as follows therein:

> and in all cases of insolvency, * * * the debt or debts due to the United States, on any such bond or bonds (for payment of duties), shall first be satisfied; * * *

To section 65 was added as a proviso the provisions which were later enacted as Revised Statutes, section 3468. Said proviso reads as follows:

> *And provided also*, that if the principal in any bond, which shall be given to the United States for duties on goods, wares or merchandise imported, or other penalty, either by himself, his factor, agent, or other person for him, shall be insolvent, * * * and * * * any surety on the said bond or bonds, or the executors, administrators, or assignees of such surety shall pay to the United States the money due upon such bond or bonds, such surety, his or her executors, administrators or assignees, shall have and enjoy the like advantage, priority or preference for the recovery and receipt of the said moneys out of the estate and effects of such insolvent, * * *

> as are reserved and secured to the United States; * * *

Sections 3466 and 3468 are therefore in *pari materia* and must, if possible, be construed so as not to conflict with each other. As was stated by Mr. Justice Field in *Chicago, Milwaukee & St. Paul Rwy. Co.* v. *United States*, 127 U. S. 406, 409:

> Where there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable.

The language of Revised Statutes, section 3468, would have to be very clear to justify this court in holding that it takes away the sovereign's prerogative of prior payment of its debts accorded by section 3466, declaratory of the ancient common law rule. A repeal of sovereign prerogative rights by implication is not favored. They can be taken away only by express words. *In re the Will of Wi Matua* 1908, A. C. 448.

FOURTH.

The construction of section 3468, Revised Statutes, contended for by the Government is the only one which will give full effect to the provisions of that section as well as section 3466, Revised Statutes.

Section 3468 gives the surety only a "like priority" as the United States would have. That priority is one over other creditors. The section does not attempt to confer upon the surety a preference over the Government whose debt it has guaranteed in whole or in part. The language of the statute is satisfied if the surety is given priority after all claims

of the United States have been paid. It does not either expressly or by implication give the surety the right to be subrogated to the claims of the United States so as to defeat its claim to prior payment.

The principle of construction here contended for by the Government has been adopted in the somewhat analogous case of *Robertson* v. *Trigg's Administrator*, 32 Grattan 76. The court there held that sureties of a United States collector, who had made default and died insolvent, were entitled under Revised Statutes, section 3468, to be subrogated to the right of priority of the United States in the payment of a debt, when they had paid it, as against the estate of a cosurety who had died before the insolvency of the collector. It was argued that because the statute made no express provision for the substitution of a surety to the rights of the creditor against a cosurety, it was intended to exclude such substitution, but the court held that the rule of substitution for the purpose of enforcing contribution between the sureties was too well established in equity to be set aside by implication of less force than an express statutory denial of the remedy. So here, the limitation upon the rule of subrogation of the surety to the creditor's rights against the principal debtor that such subrogation will never be allowed to the prejudice of the creditor is so well established that it should not be regarded as abolished unless the intention so to do is clearly expressed.

If section 3468 is construed as establishing a statutory right of a nature similar to the equitable

doctrine of subrogation (as the Government contends it should be), then clearly the court below erred in holding that the surety was entitled under the circumstances of this case to be subrogated *pro tanto* to the rights of the United States against the mining company, not only as to other creditors, but also as to the United States.

CONCLUSION.

Wherefore it is respectfully submitted that the petition for writs of certiorari to review the decision of the United States Circuit Court of Appeals for the Eighth Circuit should be granted.

ALEX C. KING,
Solicitor General.
T. J. SPELLACY,
Assistant Attorney General.

MARCH, 1920.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

THE UNITED STATES, *Petitioner,*

v.

NATIONAL SURETY COMPANY,

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR NATIONAL SURETY COMPANY IN OPPOSITION.

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St. Louis Law Printing Co., Ninth and Walnut Sts. Main 1848.

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BRIEF FOR NATIONAL SURETY COMPANY IN OPPOSITION.

STATEMENT.

Counsel for petitioner have substantially stated the facts. There are several matters, however, that we wish to add.

On October 9th, 1917, the United States received full payment of the three thousand dollar bond exe-

cuted by the National Surety Company. The release and receipt executed in connection with said bond is in part as follows:

> "Now, therefore, for and in consideration of the sum of three thousand dollars ($3,000.00) in hand paid to the party of the first part by the party of the second part, receipt whereof is hereby acknowledged by the party of the first part, the party of the first part acknowledges the said payment in full settlement and satisfaction of all claims, charges, damages and controversies existing or which may in the future exist or arise out of said bond above set forth, and discharges and agrees forever to hold harmless the said party of the second part from any and all liability, judgment or damages arising or which in the future may arise out of said bond."

On December 30th, 1916, the United States received one hundred and fifty dollars in full payment and satisfaction of the other bond executed by the National Surety Company. The release and receipt of the United States is substantially the same as the release and receipt executed in connection with the three thousand dollar bond.

The Question Involved.

The question involved is: If a surety on a bond to the United States pays the full amount of the bond and the United States receipts for same and acknowl-

edges full settlement and satisfaction, is the surety entitled, under Section 3468, Revised Statutes, to like priority to that of the United States for the recovery of said money paid on said bond, and does this like priority entitle the surety to a *pro rata* distribution with the United States of the assets of a bankrupt debtor, in case the full amount of the bond is less than the amount due the Government from the principal, the bankrupt debtor?

ARGUMENT.

The National Surety Company is entitled to like priority as is secured to the United States, because it has paid in full to the United States the bonds on which it was surety for the bankrupt.

The sections of the Revised Statutes of the United States involved in this case are Section 3466 and Section 3468, and they are as follows:

> Section 3466, R. S.: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."
>
> Section 3468, R. S.: "Whenever the principal in any bond given to the United States is insolvent or whenever, such principal being deceased, his estate and effects which come to the

hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon" (2 Fed. Stat. Ann. [2nd Ed.], 216, 6 U. S. Compiled Stats., p. 7420).

The argument of petitioner is based entirely on the theory of common-law subrogation. It is asserted by petitioner that Section 3468 is merely declaratory of the common law, that it is subject to the same limitations as exist at common law, that one of these limitations is that the creditor to whom both the principal and his surety are debtors, must be first paid in full before the surety is entitled to enforce his right of subrogation.

Our answer to this is contained in the very wording of the statute. Counsel for petitioner have entirely overlooked the wording of this statute. The priority arises to the surety when it pays in full "the money due upon such bond" and not when the creditor is paid in full.

We are of the opinion that Section 3468, R. S., was enacted for a definite specific purpose and was not intended to be declaratory of the common law. Had Congress intended to make the statute declaratory of the common-law subrogation, it would not have been limited to insolvent principals. The right of subrogation arises at common law whether the principal is solvent or insolvent. The section did not attempt to cover all cases, but simply to cover the case of an insolvent principal, where a surety pays all of the money due upon the *bonds* which it has executed. The statute gives the "*right of priority*" to the surety for "*the moneys*" paid on the surety's "*bond.*"

In the case of the United States v. Heaton, 128 Fed. 414 (C. C. A., 3rd Circuit), the Court approved this language used by the Circuit Court in deciding the case below:

> "The United States has no priority against a surety, for the reason that no statute has given it such a privileged position, while it has priority against an insolvent principal for the analogous reason that Congress has seen fit so to enact. The right of a surety, after he has paid the *money due upon his bond* to the United States, to be preferred in the distribution of his insolvent principal's estate, does not depend at all upon the answer to the question whether the United States has previously had priority against the

surety, *but rests solely upon the language of Section 3468, which expresses the legislative will upon the subject. It is this section that is the source of the surety's right, and I think its true construction gives priority for so much, and no more of the Government's claim as the surety may have beeen obliged to pay* by legal proceedings, or may have paid voluntarily, *in discharge of his obligation upon the bonds.*" (Italics are ours.)

In the case of United States v. Ryder, 110 U. S. 729, 28 Lawyer's Edition 308, *l. c.* 311, the Court said that section 3468 was substantially a reproduction of the proviso of the Act to Regulate the Collection of Custom Duties, approved March 2, 1799 (1 Stat., at L., 676). The Court said:

"The only difference between section 3468 of the Revised Statutes and this proviso is, that the latter in terms relates to bonds given for duties, whilst the former uses the more general terms, 'whenever the principal in any *bond given to the United States* is insolvent, etc.' If it was intended by Congress to enlarge the scope of the section so as to include other bonds than those given for duties, as seems to be the necessary inference from the language, still, it is restricted to '*bonds*'; the words are 'whenever the principal in any *bond* given to the United States is insolvent, etc.', and any 'surety on the *bond*' pays *the money due upon 'such bond,'* such

surety shall have the like priority, etc., and may bring and maintain a suit upon '*bond*' in his own name, *etc. This cautious phrascology*, so carefully avoiding any general words of enlargement beyond the article of '*bonds*' alone, seems to imply that, in extending the peculiar privileges given to sureties, it was only intended to do so in reference to obligations of the same general character with those referred to in the original act, that is to say, bonds conditioned for the payment of money, or, at most, to embrace, besides, those conditioned for the performance of some civil duty, such as the faithful discharge of the duties of an office, etc."

In the case of Hunter v. United States, 5 Peters 173, 8 Lawyers' Edition 86, Hunter was the assignee of Archibald and Frederick Crary. Jacob Smith had, as surety in a custom house bond, been compelled to pay to the United States, for the Crarys, the sum of $2,125.00. This payment was made in 1808. In 1809 the United States obtained judgment against Smith on another bond and Smith went into insolvency. The United States claimed priority in the Crary estate, against the other Crary creditors, on the ground that Smith, having paid a bond to the United States, was entitled to priority over the other Crary creditors. The Supreme Court of the United States sustained the priority.

The holding of the Court is to the effect that under the statutes of the United States, the surety who

pays to the United States the amount of a bond, is entitled to priority over other creditors in an insolvent estate. This is peculiarly emphasized in this case, for the reason that the Government established its claim to the assets of an insolvent estate by claiming through one who had paid to the Government the amount of the surety bond.

From the above authorities and from the express language of section 3468, it is apparent that priority arises to the surety when the surety pays *"the money due upon such bond."* The statute does not provide that priority shall arise to the surety when the surety has paid *all the claims of the Government* against a bankrupt or insolvent estate. Had Congress intended that the United States should be paid in full for *all claims* which it had against a bankrupt or an insolvent, before a surety was entitled to priority after paying the full amount of its bond, suitable wording could have been used to express this thought.

In this connection, we call the Court's attention to the fact that in section 3466, the words used are *"all debts due"* and *"the debts due* to the United States," but the words used in section 3468 are, "such surety pays to the United States *the money due upon such bond"* and "such surety shall have the like priority for the recovery and receipt of *the moneys* out of the estate and effects of such insolvent" and the surety "may bring and maintain a

suit upon the bond * * * for the recovery of *all moneys paid* thereon". Under section 3468, the surety pays *the moneys* due on the bond and is given the like priority to the United States to recover *the moneys* paid on the bond and expressly states that the surety may recover *"all moneys paid thereon";* the words *"all moneys"* means "any moneys" or "whatever moneys," or, as held by the Supreme Court in United States v. Heaton, *supra*, "Its true construction gives priority for so much, and no more, of the Government's claim as the surety may have been obliged to pay by legal proceedings or may have voluntarily paid, in discharge of his obligations upon his bond."

The Supreme Court stated in United States v. Ryder, *supra*, that the wording of the statute is "cautious phraseology." Congress, in other words, not only meant what it said, but said what it meant. The Government in its brief seeks to insert an exception in this statute and such an exception as is in contradiction of the express phraseology so "cautiously" used. Had Congress intended an exception, it could have easily added a proviso, or the wording of the statute itself could have been changed, so that the priority of the surety would not arise on its paying "the moneys due on such bond," but on its paying "all debts due to the United States from such insolvent or deceased principal."

The surety bases its right entirely upon that statute, and under it the surety is entitled to the same priority as the United States Government is, in an insolvent estate, *when the money due upon a bond is paid.*

In the releases and receipts signed by the United States at the time it was paid in full the amounts of the bonds, provide as follows:

> "This release and receipt is in full payment and satisfaction of all claims whatsoever on said *bond*, etc."

The Government having been paid in full by the surety company, the surety is entitled to the same priority that the Government has in the insolvent estate.

The authorities cited by opposing counsel are not in point. They are cases arising out of subrogation at common law, and not under section 3468, R. S. Section 3468 was not intended to cover all the various situations arising in common-law subrogation. The purpose of the statute is clearly limited to an insolvent estate and to payments made by sureties on Government bonds, and awards priority where the surety pays the full amount of the *bond*. There is no requirement under the statute that the surety shall pay *all the debts* owing by an insolvent estate to the Government, before the surety is entitled to priority.

We have read carefully the decisions cited in the brief of petitioner. These cases do not hold that the surety company is not entitled to priority where the surety has paid the full amount of the *bond* to the Government. Only one of the cases involve Government bonds, and in this case the Government was paid in full of its debt and the surety had also discharged the full amount of the bond. There is no case cited by the Government in their brief where a surety on a Government bond has paid the full amount of the bond, and the Government had not been paid in full of its debt, and these are the facts in the case at bar.

The reference to section 3468 in the case of Robertson v. Trigg's Administrator, 32 Grattan 76, is wholly *obiter*, for no claim of a surety was sought under section 3468.

In the cases of United States Fidelity and Guaranty Co. v. United States Bank and Trust Co., 228 Fed. 448, and Columbia Fidelity and Trust Company v. Kentucky Union Railway Co., 60 Fed. 794, the Court's decision is based entirely on common-law subrogation and not upon section 3468, no Federal bond was involved and the Federal statute is not even mentioned in the opinions.

The Government's brief contends that the prerogative of sovereignty in priority of debts to it, is such that it cannot be taken away except by express language. We contend express language has been used

in section 3468 sufficient to give to the surety the right of priority, when it has paid the *bond* in full.

When the statute was enacted, the common law of subrogation was well understood and the prerogative of the Government to priority was also well understood. Having both of these principles in mind, Congress of the United States provided in clear and unambiguous language, that when "such surety pays to the United States *the money due upon such bond,* such surety shall have like priority for the recovery of *the moneys.*"

We do not know how the idea of priority of the surety could have been more clearly expressed. The meaning of section 3468 is shown in the quotations above set forth, from the cases of United States v. Heaton, 128 Fed. 414, *l. c.* 417 (C. C. A., 3rd Cir.), and United States v. Ryder, 110 U. S. 729, 28 Lawyer's Edition 308, *l. c.* 311.

The Government's brief contends that if priority is allowed to the surety in this case, the Government will lose some money. The surety in this case declines to assume the responsibility of the Government's losing the money. The surety has paid in full the bonds executed to the Government, and, as stated by the District Court in deciding this case, the bonds were "paid promptly."

The Government could have very easily secured payment of its loss in full by requiring a larger bond.

The Government itself fixed the size of the bond; the Surety Company had no decision in the matter. The bond was arranged between the Government and the contractor. Congress evidently presumed that the officers of the Government would ask for a bond that would fully protect it; hence provided that when the bond was paid in full, the surety's priority was substituted for the priority of the Government.

There is no way to protect the Government if it insists on procuring such a small bond. If the Government had only required a $100.00 bond for a $3,000.00 contract, the Government would simply be running a chance in having the contractor fail and receiving only $100.00 from the surety.

The Government contends that if it had chosen to file its claim in bankruptcy for the full amount of its loss, and had been paid such an amount as it could have secured as a preferred claimant, it could have then proceeded on the bonds in question, and the Surety Company would have no defense.

The answer to this contention is that no such case is presented by the record. The Surety Company paid in full the amount of the bonds and the Government receipted for the money in full and afterwards the Government then proceeded against the bankrupt's estate. The Government having proceeded against the Surety Company first on the bonds, the Surety Company is entitled to the same priority as the Govern-

ment against the insolvent estate. Even if the Government had proceeded against the insolvent estate before proceeding against the surety, the surety could have protected its priority by tendering to the United States the amount of the bonds, and a refusal by the Government to accept the tender would have released the surety.

This not only destroys the argument of the Government that it could have secured the assets of the bankrupt estate and then have proceeded against the surety, but shows definitely that the proper construction of section 3468, giving the surety "like priority" with the Government, is fully protected, and that the construction contended for by us is the correct one. If the law is as contended for by the Government, it is surprising that the Government should have first made demand on the surety company for the full amount of the bonds and actually received from the Surety Company full payment of the bonds, signing a receipt and release for same, and then afterwards filed the claims in the bankrupt estate. The very action of the Government in collecting in full the amount of the bonds before filing the claim in the bankrupt estate shows that the Government understood that the surety's priority would be protected in all events. The course of the Government is not in accordance with its present contention.

The Government contends that under its construction of section 3468, the United States should receive the entire amount of the assets of the estate of the bankrupt mining company, leaving nothing for the surety company. The position of the Government is, therefore, that the proper construction of section 3468 is entirely dependent upon the amount of the assets of the bankrupt estate. Our contention is that the meaning of the statute is not dependent upon the amount of the assets of the bankrupt estate, and that the words "like priority" mean that the surety has the same priority of the Government itself.

It would frequently be impossible to tell until after the time for filing the claims had expired whether or not there would be enough money to pay the Government's claims in full and still give the Surety Company a sufficient dividend to reimburse it.

The construction which the Government places upon section 3468 is apparently this: If the bankrupt estate has sufficient to pay the United States' claim in full, after the Surety Company has paid its bond in full, then the Surety Company is entitled to "like priority," but if there is not sufficient assets to pay the Government's claim and the surety's also, then the words "like priority" have no meaning. As we view the express wording of the statute, the words "like priority" mean exactly what they say, whatever the amount of the bankrupt estate. The statute

provides that the Surety Company and the United States have "like priority," so far as their participation in the bankrupt estate is concerned, after the payment by the surety of the full amount of the bond. The Surety Company and the United States must, therefore, participate *pro rata* in the assets of the bankrupt estate.

The whole argument of the Government should be addressed to the Congress and not to this Court. Section 3466 of Revised Statutes was in effect before the enactment of section 3468. It is evident, therefore, that Congress, representing the sovereign, intended to give the surety the priority which we are contending for. If the Government thinks that Congress has overlooked the possibility of the Government's accepting bonds which are not sufficient protection to Government contracts, then this is a matter for the Congress.

We are forced to the conclusion that the petition should be denied.

Respectfully submitted,

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THE STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES, PETITIONER, v. NATIONAL SURETY COMPANY. } Nos. 271 and 272.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER.

STATEMENT OF THE CASE.

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted herein May 6, 1920 (R. 51[1]) to review the decree of said Circuit Court of Appeals entered December 10, 1919 (R. 50) affirming the order and decree of the District Court of the United States for the Eastern District of Missouri, entered on December 31, 1918, in the matter of Bald Eagle Mining Company, a corporation, bankrupt (R. 43).

THE FACTS.

In June, 1916, the Bald Eagle Mining Company entered into two contracts with the United States Government to furnish to it certain coal at certain

[1] All references are to the record in No. 271.

prices and within a certain time. To secure the performance of these contracts, the Mining Company executed two bonds, one for $3,000 and one for $150, with the National Surety Company as surety. The Mining Company failed to perform the contracts and the United States was compelled to buy in the open market the amount of coal contracted for by it. This caused a loss to the United States of about $13,000.

On November 29, 1916, the Mining Company was adjudicated a bankrupt. On November 3, 1917, the National Surety Company, respondent herein, having paid the United States $3,150, the amount of the bonds, filed with the referee in bankruptcy two claims against the bankrupt for $3,000 and $150, respectively (R. 20, 30), which were allowed on said date as general claims. On December 12, 1917, the United States filed with said referee its claim in the sum of $9,912.84, representing the loss incurred by it after deducting the $3,150 paid it by the surety company, and on the same day said referee made an order allowing said claim and directed that it be accorded priority over all other claims except those for wages and taxes (R. 6). The Mining Company's assets were not sufficient to pay in full the claims of both the United States and the Surety Company (R. 10).

On March 12, 1918, more than one year subsequent to the date of adjudication, the Surety Company moved for leave to amend its claims and to have them allowed as preferred claims of the same class

as that of the United States (R. 8, 9). These motions were granted by the referee (R. 38, 39). From the judgment of the District Court approving and confirming this order (R. 43) the United States appealed to the Circuit Court of Appeals for the Eighth Circuit. It also filed in that court a petition to revise the order of the District Court (R. 1). The Circuit Court of Appeals (Judge Hook dissenting) affirmed the judgment of the District Court.

THE STATUTES.

The construction of the following sections of the Revised Statutes is necessary to a determination of the issues involved in this case:

> Section 3466: Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.
>
> Section 3468: Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or

> assignee are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States, and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon.

THE CONTENTIONS OF THE PARTIES.

Respondent, while not disputing that at common law it would not be entitled to be subrogated to the rights of the sovereign against the bankrupt until the latter's obligation to the former had been paid in full, contends that the law has been changed by Revised Statutes, section 3468, and that under that statute the surety, having paid the Government the amount due on the bond executed by it, though less than the amount due from the principal debtor, is subrogated *pro tanto* to the rights of the United States against such principal debtor.

The Government, on the other hand, contends that Revised Statutes, section 3468, does not change the common law, but is merely declaratory of it; that only by so construing section 3468 can full effect be given to all the provisions of that section as well as of section 3466 and a conflict between the two, which are in *pari materia*, be avoided.

ARGUMENT.

I.

At common law a surety is not subrogated to the rights of the sovereign against the principal debtor until the claim of the former has been satisfied in full.

In this case petitioner and respondent set up conflicting claims to the assets of a bankrupt corporation. The Government's claim is for $9,912.84; that of the surety is for $3,150. The assets of the bankrupt are $8,253.36. If the surety is subrogated *pro tanto* to the rights of the United States against the estate of the bankrupt, it will receive $1,990.23 and the sum the Government will receive in satisfaction of its claim against the bankrupt will be diminished by that amount. To permit the surety to profit in this manner at the expense of the United States is clearly contrary to several well-established principles of law.

First. The right of a surety to be subrogated to the rights of the creditor against the principal debtor is the creature of equity. It is elementary that such subrogation will never be permitted to the prejudice of the creditor. Otherwise, the object of calling for a surety, i. e., to further secure payment of the debt, would be defeated.

Hence it is well established that a surety is not entitled to be subrogated to the rights of the creditor against the principal debtor until the latter's debt to the former has been paid in full, and this rule

applies though the surety was liable for only part of the debt and has paid that part. As stated in Sheldon on Subrogation, 2d Ed., section 127:

> Even if a surety is liable only for a part of the debt, and pays that part for which he is liable, he can not be subrogated to the securities held by the creditor for the debt, until the whole demand of the creditor is satisfied.

In *Peoples* v. *Peoples Brothers, Inc.*, 254 Fed. 489, it was held that the surety on a building contractor's bond, conditioned for the payment of claims for labor and material, which, on the contractor's insolvency, paid into court the amount of its obligation, which sum was, however, sufficent to pay only 65 per cent of the claims of creditors secured by the bond, was not entitled by subrogation to the amount paid by it until the claims for labor and material were paid in full. To the same effect see *United States Fidelity & Guaranty Company* v. *Union Bank & Trust Company*, 228 Fed. 448; *National Bank of Commerce* v. *Rockefeller*, 174 Fed. 22; *Wilcox* v. *Fairhaven Bank*, 7 Allen, 270; *Swan* v. *Patterson*, 7 Md. 164; *Willingham* v. *Ohio Valley Banking & Trust Company*, 22 Ky. Law Rep. 158.

Second. In this instance the creditor is the sovereign, and it is well settled that the debts of the sovereign are paramount and entitled to priority of payment over the claims of private creditors. Revised Statutes, section 3466, so far as material here, provides that "Whenever any person indebted to the United States is insolvent * * * the debts due

to the United States shall be first satisfied * * *." This statute is merely declaratory of the old common law principle just stated.

True, the statute limits the application of the principle to the circumstances therein set forth, that is, where the debtor is insolvent or has died leaving insufficient assets to pay all his debts, etc.; but it is, nevertheless, within its scope an application of the common law principle.

While it is conceded that section 3466 has been modified by the bankruptcy act of 1898 (sec. 64) to the extent that debts due the United States other than for taxes are not now of the first rank (*Guarantee Title & Trust Company* v. *Title Guaranty & Surety Company*, 224 U. S. 152) but stand sixth in order of liquidation, they are, nevertheless, still preferred claims and superior to those of the general creditor, and so far as the merits of this case go section 3466 is in full force and effect.

The ancient prerogative of the sovereign mentioned above itself depended upon the principle which determined "a preference in favor of the Crown in all cases and touching all rights of what kind soever where the Crown's and the subject's right concur and so come into competition." This principle has recently been declared by the Privy Council of England never to have been questioned as a rule of law since the days of Lord Coke and to be of universal application, except in so far as it has been modified by the legislature. (*New South Wales Taxation Commissioners* v. *Palmer*, 1907, A. C. 179.)

This prerogative right of the sovereign has long been recognized by the courts of this country and is one of the fundamental principles in our system of law. As this court said in the case of *Dollar Savings Bank* v. *United States*, 19 Wall., 227, 239:

> It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution.

Speaking of provisions of the acts of March 3, 1797, and March 2, 1799, substantially identical with the provisions of section 3466, Revised Statutes, this court said in *United States* v. *Bank of North Carolina*, 6 Peters, 29, 35:

> The same policy which governed in the case of the royal prerogative may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation.

It is clear, therefore, that both at common law and under the express provisions of Revised Statutes, section 3466, the surety can not share in the distribution of the bankrupt's assets until the claim of the United States has been satisfied in full.

II.

Revised Statutes, section 3468, does not change the common law, but is merely declaratory of it.

Respondent does not dispute the correctness of the Government's contention as to the common law. It contends, however, that the common law has been changed by Revised Statutes, section 3468. This contention is based on the declaration of that statute that whenever "any surety on the bond * * * pays to the United States the money due upon such bond, such surety * * * shall have the like priority * * * as is secured to the United States." Respondent's contention, which was adopted by the majority of the Circuit Court of Appeals, is that the fact that the statute provides that the surety shall have the like priority as the United States whenever it pays the United States the money due upon its bond shows that the common law has been changed and that under the statute it is not a condition precedent to the surety's right of subrogation that the Government shall have been paid in full.

This contention is obviously unsound. Section 3468 is no more than a statutory declaration of the common law principle that a surety who has paid the debt of his principal to the sovereign is entitled to the sovereign's priority in the administration of his principal's estate. (*Manisty* v. *Churchill*, 39 Ch. D. 174; *Orem, Executrix* v. *Wrightson*, 51 Md. 34; *Richeson* v. *Crawford*, 94 Ill. 165; *United States* v. *Ryder*, 110

U. S. 729.) Under this section the surety is subrogated to the rights of the creditor against the principal debtor only if he would have had that right at common law.

This construction is the only one which will give full effect to the provisions of that section as well as of section 3466. Section 3468 gives the surety only a "like priority" as the United States would have. That priority is one over other private creditors. The section does not attempt to confer upon the surety a preference over the Government whose debt it has guaranteed in whole or in part. The language of the statute is satisfied if the surety is given priority after all claims of the United States have been paid. It does not, either expressly or by implication, give the surety the right to be subrogated to the claims of the United States when, as in the case at bar, the latter's claim to prior payment would be defeated and the surety would escape the full performance of its obligations.

To construe this section differently would be to bring it squarely in conflict with section 3466. The latter section was originally enacted as section 5 of the act of March 3, 1797 (1 Stat. 512, 515), the material part of which reads as follows:

> That where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, * * * the debt due to the United States shall be first satisfied, * * *.

That section was partly reenacted as a portion of section 65 of the act of March 2, 1799 (1 Stat. 627, 676), and reads as follows therein:

> and in all cases of insolvency, * * * the debt or debts due to the United States, on any such bond or bonds (for payment of duties), shall be first satisfied: * * *.

To section 65 was added as a proviso the provisions which were later enacted as Revised Statutes, section 3468. Said proviso reads as follows:

> *And provided also*, That if the principal in any bond which shall be given to the United States for duties on goods, wares, or merchandise imported, or other penalty, either by himself, his factor, agent, or other person for him, shall be insolvent, * * * and * * * any surety on the said bond or bonds, or the executors, administrators, or assignees of such surety shall pay to the United States the money due upon such bond or bonds, such surety, his or her executors, administrators, or assignees shall have and enjoy the like advantage, priority, or preference for the recovery and receipt of the said monies out of the estate and effects of such insolvent, * * * as are reserved and secured to the United States: * * *.

Sections 3466 and 3468 are derived from this section and are therefore in *pari materia*. They must, if possible, be construed so as not to conflict with each other. As was stated by Mr. Justice Field in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 127 U. S. 406, 409:

> When there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable.

This court has held that Revised Statutes, section 3466, is not to be strictly or narrowly construed. *United States* v. *Bank of North Carolina*, 6 Peters 29, 35. The language of section 3468 would have to be very clear to justify this court in holding that it repeals to the extent contended for by the Surety Company the rule of the common law and section 3466, that the sovereign is entitled to priority in the payment of debts due it over those due a private creditor. A repeal of the sovereign's prerogative rights by implication is not favored. They can be taken away only by express words. In re the Will of Wi Matua, 1908, A. C. 448.

The principle of construction here contended for by the Government has been adopted in the somewhat analogous case of *Robertson* v. *Trigg's Administrator*, 32 Grattan 76. The court there held that sureties of a United States collector, who had made default and died insolvent, were entitled under Revised Statutes, section 3468, to be subrogated to the right of priority of the United States in the payment of a debt, when they had paid it, as against the estate of a cosurety who had died before the insolvency of the collector. It was argued that because the statute made no express provision for the substitution of a surety to the rights of the creditor against a cosurety, it was intended to exclude such substitution, but the court held that the rule of substitution for the purpose

of enforcing contribution between the sureties was too well established in equity to be set aside by implication of less force than an express statutory denial of the remedy. So here the limitation upon the rule of subrogation of the surety to the creditor's rights against the principal debtor that such subrogation will never be allowed to the prejudice of the creditor is so well established that it should not be regarded as abolished unless the intention so to do is clearly expressed.

It is said that this construction is unreasonable, because if so construed section 3468 confers no priority upon the surety unless he pays all of the debt or debts due from the bankrupt to the United States, and if he pays more than the amount he is obligated to pay he is a mere volunteer and not entitled to subrogation as to the excess.

That this is the consequence of adopting the Government's contention is true; but such is undoubtedly the law unless the common law has been modified by statute. And to construe section 3468 as modifying the common law is contrary to all the recognized canons of construction.

Besides, the consequence of adopting respondent's contention would be that the extent to which the Government could enforce satisfaction of its claim would depend upon whether it proceeded first against the surety or against the bankrupt, a result surely not contemplated by Congress. If the United States proceeded first against the bankrupt, all of his assets would have to be applied to the satisfaction of the

Government's claim and the surety would be liable to the Government for the unsatisfied balance of its claim, if any, without being able to recover the amount paid by it from the bankrupt. If, on the other hand, the Government proceeded first against the surety and proved the unsatisfied balance of its claim against the bankrupt estate of the principal debtor, the surety would be allowed to share pro rata in the distribution of his assets. A result so unreasonable must, if possible, be avoided.

If section 3468 is construed as establishing a statutory right of a nature similar to the equitable doctrine of subrogation (as the Government contends it should be), then clearly the court below erred in holding that the surety was entitled under the circumstances of this case to be subrogated *pro tanto* to the rights of the United States against the mining company not only as to other creditors, but also as to the United States.

CONCLUSION.

Wherefore it is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed and the cause remanded.

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SEPTEMBER, 1920.

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AUTHORITIES CITED.

THE STATUTES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

THE UNITED STATES,
Petitioner,
v.
NATIONAL SURETY COMPANY.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT, NATIONAL SURETY COMPANY.

STATEMENT OF THE CASE.

Counsel for petitioner have substantially stated the facts. There are several matters, however, that we wish to add.

On October 9th, 1917, the United States received full payment of the three thousand dollar bond executed by the National Surety Company. The release and receipt (Rec., p. 34) executed in connection with said bond is in part as follows:

"Now, therefore, for and in consideration of the sum of three thousand dollars ($3,000.00) in hand paid to the party of the first part by the party of the second part, receipt whereof is hereby acknowledged by the party of the first part, the party of the first part acknowledges the said payment in full settlement and satisfaction of all claims, charges, damages and controversies existing or which may in the future exist or arise out of said bond above set forth, and discharges and agrees forever to hold harmless the said party of the second part from any and all liability, judgment or damages arising or which in the future may arise out of said bond."

On December 30th, 1916, the United States received one hundred and fifty dollars in full payment and satisfaction of the other bond executed by the National Surety Company. The release and receipt of the United States is substantially the same as the release and receipt executed in connection with the three thousand dollar bond (Rec., p. 36).

The Question Involved.

The question involved may be thus stated:

Is the surety, who has paid to the United States the full amount of its bond, entitled under Section 3468, R. S., to "the like priority" of the United States over other creditors of the insolvent estate of the

principal, only when all the debts owing by the insolvent principal to the United States have been paid (as claimed by petitioner), or, "whenever the surety pays to the United States the money due upon such bond" (as stated in section 3468, and as contended for by respondent)?

ARGUMENT.

Under section 3468, a surety on a bond to the United States is entitled to like priority to the United States against the insolvent principal's estate "whenever the surety pays to the United States the money due upon such bond", and it is not necessary for the surety or the principal to pay all the debts due from the principal to the United States to entitle the surety to this "like priority".

The pertinent parts of the sections of the Revised Statutes of the United States involved in this case are as follows:

> Section 3466, R. S.: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; * * *"
>
> Section 3468, R. S.: "Whenever the principal in any bond given to the United States is insolvent * * * and * * * any surety on the bond * * * pays to the United States the money due upon such bond, such surety * * * shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States" (2 Fed. Stat. Ann. [2nd Ed.], 216, 223, 6 U. S. Compiled Stats., p. 7420).

It is conceded by the Government that the surety who pays the money due on a bond to the United States is entitled to "the like priority" that is secured to the United States, provided the Government's debt is paid in full. The priority of the Government is defined in section 3466 as "the debts due to the United States shall be first satisfied". The word "like" has been judicially defined as "equal in quantity, quality or degree; exactly corresponding" (Badger v. Daniel, 79 N. C. 372, 387). Hence, when the surety acquires the Government's priority, the surety has exactly the same rights as the Government had. The surety stand in the shoes of the Government.

The one question involved here is, when does the Surety acquire the Government's right of priority. Section 3468 plainly says the surety is substituted into the Government's priority "whenever the Surety pays to the United States the money due on such bond". The Government contends that the priority does not arise until all the debts due the Government are paid in full.

The argument of petitioner is based entirely on the theory of common-law subrogation. It is asserted by petitioner that section 3468 is merely declaratory of the common law, that it is subject to the same limitations as exist at common law, and that one of these limitations is that the creditor to whom both the

principal and his surety are debtors, must be first paid in full before the surety is entitled to enforce his right of subrogation.

Our answer to this is contained in the very wording of the statute. Section 3468 clearly says:

> "*Whenever* * * * such surety pays to the United States the *money due upon such bond* * * * such surety shall have the like priority * * * as is secured to the United States."

Counsel for petitioner have entirely overlooked the wording of this statute. The priority arises to the surety "whenever" it pays in full "the money due upon such bond" and not when the creditor is paid in full by the surety or the insolvent.

Undoubtedly Section 3648, R. S., was enacted for a definite specific purpose and was not intended to be declaratory of the common law. Had Congress intended to make the statute declaratory of the common-law subrogation, it would not have been limited to insolvent principals. The right of subrogation arises at common law whether the principal is solvent or insolvent. The section did not attempt to cover all cases, but simply to cover the case of an insolvent principal, where a surety pays all of the money due upon the *bond* which it has executed. The statute gives the "*right of priority*" to the surety for "*the money*" paid on the surety's "*bond*".

In the case of the United States v. Heaton, 128 Fed. 414 (C. C. A., 3rd Circuit), the Court approved this language used by the Circuit Court in deciding the case below:

> "The United States has no priority against a surety, for the reason that no statute his given it such a privileged position, while it has priority against an insolvent principal for the analogous reason that Congress has seen fit so to enact. The right of a surety, after he has paid the *money due upon his bond* to the United States, to be preferred in the distribution of his insolvent principal's estate, does not depend at all upon the answer to the question whether the United States has previously had priority against the surety, *but rests solely upon the language of Section 3468, which expresses the legislative will upon the subject. It is this section that is the source of the surety's right, and I think its true construction gives priority for so much, and no more of the Government's claim as the surety may have been obliged to pay* by legal proceedings, or may have paid voluntarily, *in discharge of his obligation upon the bonds.*" (Italics are ours.)

In the case of United States v. Ryder, 110 U. S. 729, 738, 28 Lawyer's Edition 308, *l. c.* 311, the Court said that section 3468 was substantially a reproduction of the proviso of the Act to Regulate the Collection of Custom Duties, approved March 2, 1799 (1 Stat., at L., 676). The Court said:

"The only diffference between Section 3468 of the Revised Statutes and this proviso is, that the latter in terms relates to bonds given for duties, whilst thee former uses the more general terms, 'whenever the principal in any bond given to the United States is insolvent, etc.' If it was intended by Conggress to enlarge the scope of the section so as to include other bonds than those given for duties,, as seems to be the necessary inference from the language, still, it is restricted to '*bonds*'; the words are 'whenever the principal in any *bomd* given to the United States is insolvent, etc.', and any 'surety on the *bond*' pays the money due upon 'such *bond*,' such surety shall havce the like priority, etc., and may bring and maintain a suit upon '*bond*' in his own name, etc. Thiss cautious phraseology, so carefully avoiding amy general words of enlargement beyond the artiicle of 'bonds' alone, seems to imply that, in extending the peculiar privileges given to suretiess, it was only intended to do so in reference to obligations of the same general character with those referred to in the original act, that is to say, bonds conditioned for the payment of money, or, at most, to embrace, besides, those conditioned for the performance of some civil duty, such as the faithful discharge of the duties of an office, etc." (Italics are the Court's.)

In the case of Hunter v. United States, 5 Peters 173, 8 Lawyers' Edition 86, Hunter was the assignee of Archibald and Frederick Crary. Jacob Smith had,

as surety in a custom house bond, been compelled to pay to the United States, for the Crarys, the sum of $2,125.90. This payment was made in 1808. In 1809 the United States obtained judgment against Smith on another bond and Smith went into insolvency. The United States claimed priority in the Crary estate, and against the other Crary creditors, on the ground that Smith, having paid a bond to the United States, was entitled to priority over the other Crary creditors. The Supreme Court of the United States sustained the priority. See also Guarantee T. & T. Co. v. Title Guarantee & S. Co., 224 U. S. 152, 56 L. Ed. 706.

The holding of the Court is to the effect that under the statutes of the United States, the surety who pays to the United States the amount of a bond, is entitled to priority over other creditors in an insolvent estate. This is peculiarly emphasized in this case, for the reason that the Government established its claim to the assets of an insolvent estate by claiming through one who had paid to the Government the amount of the surety bond.

From the above authorities and from the express language of section 3468, it is apparent that priority arises to the surety when the surety pays "*the money due upon such bond.*" The statute does not provide that priority shall arise to the surety when the surety has paid *all the claims of the Government* against a bankrupt or insolvent estate. Had Congress intended that the United States should be paid in full for *all*

claims which it had against a bankrupt or an insolvent, before a surety was entitled to priority after paying the full amount of its bond, suitable wording could have been used to express this thought.

In this connection, we call the Court's attention to the fact that in section 3466, the words used are "*all debts due*" and "*the debts due* to the United States," but the words used in section 3468 are, "such surety pays to the United States *the money due upon such bond*" and "such surety shall have the like priority for the recovery and receipt of *the moneys* out of the estate and effects of such insolvent" and the surety "may bring and maintain a suit upon the bond * * * for the recovery of *all moneys paid* thereon". Under section 3468, the surety pays *the moneys* due on the bond and is given the like priority to the United States to recover *the moneys* paid on the bond and expressly states that the surety may recover "*all moneys paid thereon*"; the words "*all moneys*" means "any moneys" or "whatever moneys," or, as held by the Supreme Court in United States v. Heaton, *supra*, "Its true construction gives priority for so much, and no more, of the Government's claim as the surety may have been obliged to pay by legal proceedings or may have voluntarily paid, in discharge of his obligations upon his bond."

The Supreme Court stated in United States v.

Ryder, *supra*, that the wording of the statute is "cautious phraseology." Congress, in other words, not only meant what it said, but said what it meant. The Government in its brief seeks to insert an exception in this statute and such an exception as is in contradiction of the express phraseology so "cautiously" used. Had Congress intended an exception, it could have easily added this proviso, "provided that the United States has no claim against the insolvent estate", or the wording of the statute itself could have been changed, so that the priority of the surety would not arise on its paying "the moneys due on such bond," but on its paying "all debts due to the United States from such insolvent principal".

In this connection Judge Carland said in the opinion of the Circuit Court of Appeals in this case (Rec., pp. 47, 48):

> "There is no question as to the meaning of Sec. 3466. In the cases specified in said section the United States has beyond question undoubted priority. When we come to section 3468 it is claimed by counsel for the United States that it must be so construed as to be of no force or effect except in cases where the United States has no claim whatever to be satisfied, and it appearing in the present case that the United States has a claim against the estate of the bankrupt, said section is inoperative. The ground of this contention is that the priority granted by sec-

tion 3466 still attaches to the claim of the United States even as against the claims of respondent, and that no priority exists in favor of respondent until the claim of the United States is full paid. *If this contention is sound we must read into section* 3468 *a proviso at the end of the last clause but one of the section, reading as follows, 'provided that said United States has no claim against the insolvent estate.' We do not have any authority to interpolate such a proviso.* We are of the opinion that while the general priority of the United States is undoubted, it is within the power of Congress to qualify or limit this priority, and that by the enactment of section 3468 it has been provided that in the cases mentioned in said section the priority of the United States has been transferred to a surety who has paid the penalty of a bond in full, notwithstanding the latter still has a claim against the insolvent. It is claimed by counsel for the United States that the surety in a case like the one at bar has no priority unless he pays all of the debt or debts due from the bankrupt to the United States. The section which we are endeavoring to construe does not provide that the surety shall pay all the debt or debts due from the bankrupt estate to the United States, but only the money due upon such bond, and it is conceded that the respondent did this. It paid all the debt for which it was obligated as surety. *If it should pay any more it would be a mere volunteer and not entitled to the right of subrogation as to the excess.* It is not material if the contention of

> counsel for the United States is right whether the claim of the United States arises out of the same transaction as that of respondent or not." (Italics are ours.)

The surety bases its right entirely upon that statute, and under it the surety is entitled to the same priority as the United States Government is, in an insolvent estate, *when the money due upon a bond is paid.*

In the releases and receipts signed by the United States at the time it was paid in full the amounts of the bonds, provide as follows:

> "This release and receipt is in full payment and satisfaction of all claims whatsoever on said *bond*, etc."

The Government having been paid in full by the surety company, the surety is entitled to the same priority that the Government has in the insolvent estate.

The authorities cited by opposing counsel are not in point. They are cases arising out of subrogation at common law, and not under Section 3468, R. S. Section 3468 was not intended to cover all the various situations arising in common-law subrogation. The purpose of the statute is clearly limited to an insolvent estate and to payments made by sureties on Government bonds, and awards priority where the surety

pays the full amount of the *bond*. There is no requirement under the statute that the surety shall pay *all the debts* owing by an insolvent estate to the Government, before the surety is entitled to priority.

We have read carefully the decisions cited in the brief of petitioner. These cases do not hold that the surety company is not entitled to priority where the surety has paid the full amount of the *bond* to the Government. Only one of the cases involve Government bonds, and in this case the Government was paid in full of its debt and the surety had also discharged the full amount of the bond. There is no case cited by the Government in their brief where a surety on a Government bond has paid the full amount of the bond, and the Government had not been paid in full of its debt, and these are the facts in the case at bar.

The reference to section 3468 in the case of Robertson v. Trigg's Administrator, 32 Grattan 76, is wholly *obiter*, for no claim of a surety was sought under section 3468.

In the cases of United States Fidelity and Guaranty Co. v. United States Bank and Trust Co., 228 Fed. 448, and Columbia Fidelity and Trust Company v. Kentucky Union Railway Co., 60 Fed. 794, the Court's decisions are based entirely on common-law subrogation and not upon section 3468, no Federal bond was involved and the Federal statute is not even mentioned in the opinions.

The Government's brief contends that the prerogative of sovereignty as to priority of debts to it, is such that it cannot be taken away except by express language. We contend express language has been used in Sec. 3468 sufficient to give to the surety the right of priority, when it has paid the *bond* in full. The case of Guarantee T. & T. Co. v. Title Guarantee & S. Co., 224 U. S. 152, is directly in point and sustains our position.

When the statute was enacted, the common law of subrogation was well understood and the prerogative of the Government to priority was also well understood. Having both of these principles in mind, Congress of the United States provided in clear and unambiguous language, that "whenever such surety pays to the United States *the money due upon such bond*, such surety shall have like priority for the recovery of *the moneys*."

We do not know how the idea of priority of the surety could have been more clearly expressed. The meaning of Sec. 3468 is shown in the quotations above set forth, from the cases of the United States v. Heaton, 128 Fed. 414, *l. c.* 417 (C. C. A., 3rd Cir.), and United States v. Ryder, 110 U. S. 729, 28 Lawyer's Edition 308, *l. c.* 311.

The opinion of the Circuit Court of Appeals (Rec., p. 48) says on this subject:

> "It is contended and it is no doubt the law that the priority of the sovereign exists in full force

and v[illegible]r unless qualified by express words. But *we have express words in Sec.* 3468. *We think that Secs.* 3466 *and* 3468 *should be construed together so as to give both force and effect, the United States retaining its priority as to the balance of its claims against the bankrupt estate and the respondent standing on a level with them as to its claim.* No case has been cited nor have we found one deciding the question involved. The cases cited simply establish the proposition that where the title of the United States and the citizen concur, the title of the United States except so far as the Legislature has thought fit to interfere shall be preferred, and that where the principal in any bond given to the United States is insolvent and any surety on the bond pays to the United States the money due upon such bond, such surety shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent as is secured to the United States. These rights are all given by the sections quoted and citation of other authority is unnecessary. *Respondent's rights must be determined by Sec.* 3468. *What its rights would be under the equitable doctrine of subrogation is not involved. The unreasonableness of the contention of counsel of the United States is made to appear when we consider a case where different bonds have been given by an insolvent to the United States with different sureties. One surety pays the full penalty of the bond on which he is liable, but he can have no priority until he has paid all the other bonds on which he is not liable.*" (Italics are ours.)

The Government's brief contends that if priority is allowed to the surety in this case, the Government

will lose some money. The surety in this case declines to assume the responsibility of the Government's losing the money. The surety has paid in full the bonds executed to the Government, and, as stated by the District Court in deciding this case, the bonds were "paid promptly."

The Government could have very easily secured payment of its loss in full by requiring a larger bond. The Government itself fixed the size of the bond; the surety company had no decision in the matter. The bond was arranged between the Government and the contractor. Congress evidently presumed that the officers of the Government would ask for a bond that would fully protect it; hence provided that when the bond was paid in full, the surety's priority was substituted for the priority of the Government.

There is no way to protect the Government if it insists on procuring such a small bond. If the Government had only required a $100.00 bond for a $3,000.00 contract, the Government would simply be running a chance in having the contractor fail and receiving only $100.00 from the surety.

The Government contends that if it had chosen to file its claim in bankruptcy for the full amount of its loss, and had been paid such an amount as it could have secured as a preferred claimant, it could have then proceeded on the bonds in question, and the surety company would have no defense.

There are two conclusive answers to this contention. First: No such case is presented by the record. The surety company paid in full the amount of the bonds and the Government receipted for the money in full and afterwards the Government proceeded against the bankrupt's estate. The Government having proceeded against the surety company first on the bonds, the surety company is entitled to the same priority as the Government against the insolvent estate. Second: Even if the Government had proceeded against the insolvent estate before proceeding against the surety, the surety could and would have protected its priority by tendering to the United States the amount of the bonds, and a refusal by the Government to accept the tender would have released the surety.

This not only destroys the argument of the Government that it could have secured the assets of the bankrupt estate and then have proceeded against the surety, but shows definitely that the proper construction of section 3468, giving the surety "like priority" with the Government, is fully protected, in all events, and that the construction contended for by us is the correct one.

The Government contends that under its construction of section 3468, the United States should receive the entire amount of the assets of the estate of the bankrupt mining company, leaving nothing for the

surety company. The position of the Government is, therefore, that the proper construction of section 3468 is entirely dependent upon the amount of the assets of the bankrupt estate. Our contention is that the meaning of the statute is not dependent upon the amount of the assets of the bankrupt estate, and that the words "like priority" mean that the surety has the same priority of the Government itself.

It would frequently be impossible to tell until after the time for filing the claims had expired whether or not there would be enough money to pay the Government's claims in full and still give the Surety Company a sufficient dividend to reimburse it.

The construction which the Government places upon section 3468 is apparently this: If the bankrupt estate has sufficient to pay the United States' claim in full, after the Surety Company has paid its bond in full, then the Surety Company is entitled to "like priority", but if there is not sufficient assets to pay the Government's claim and the surety's also, then the words "like priority" have no meaning. As we view the express wording of the statute, the words "like priority" mean exactly what they say, whatever the amount of the bankrupt estate. The statute provides that the Surety Company and the United States have "like priority", so far as their participation in the bankrupt estate is concerned, "when-

ever'' the surety pays the full amount of the bond. The Surety Company and the United States must, therefore, participate *pro rata* in the assets of the bankrupt estate.

The whole argument of the Government should be addressed to the Congress and not to this Court. Section 3466 of the Revised Statutes was in effect before the enactment of section 3468. It is evident, therefore, that Congress, representing the sovereign, intended to give the surety the priority which we are contending for. If the Government thinks that Congress has overlooked the possibility of the Government's accepting bonds which are not sufficient protection of Government contracts, then this is a matter for the congress.

The learned counsel for the United States have frankly conceded that the construction contended for by them is unreasonable. They say on page 13 of their brief:

> ''It is said that this construction is unreasonable, because if so construed section 3468 confers no priority upon the surety unless he pays all of the debt or debts due from the bankrupt to the United States, and if he pays more than the amount he is obligated to pay he is a mere volunteer and not entitled to subrogation as to the excess.
>
> ''That this is the consequence of adopting the Government's contention is true.''

The able opinion of the Circuit Court of Appeals also finds this fatal objection of unreasonableness in the contention of the Government (Rec., p. 48). It is, of course, a cardinal rule of statutory construction that the courts will not give a statute an unreasonable construction when a reasonable construction is possible. In the case of Knowlton v. Moore, 178 U. S. 41, 77, 44 L. Ed. 969, 984, the Court said:

> "We are therefore bound to give heed to the rule that, where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute" (citing cases).

The brief of petitioner (Rec., pp. 10, 11) calls attention to the fact that Section 3466 and Section 3468 were both re-enacted parts of the Act of March 2nd, 1799. That is true and significant. Sections 3466 and 3684 were at one time one statute, and section 3468 was a proviso or exception to section 3466. This statute was subsequently resolved into two parts. This shows the clear intention of Congress was to put a limitation on the rights of the Government mentioned in the first part of the statute (now section 3466) by adding the proviso (now section 3468). Judge Lurton, in Deitch v. Staub, 115 Fed. 309, 314 (C. C. A., 6th Circuit), says:

> "The primary and usual office of a proviso is to except something out of a statute which would otherwise be within it. Its use is to take special instances out of a general class" (citing Sutherland Statutory Construction, Sections 222, 223; Gibbons v. Ogden, 9 Wheat 191, 61 L. Ed. 23).

In the case of Voorhees v. Jackson, 10 Peters 449, 471, 9 L. Ed. 490, 499, the Court said:

> "The first part of this propostion is the true meaning of the law of Ohio; the various acts required to be done previous to a sale are prescribed by a proviso, which in deeds and laws is a limitation or exception to a grant made or authority conferred; the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided."

The history of section 3468 shows that its purpose was to carve out of the general right of priority of the Government an exception in favor of a surety. The exception is fully and accurately described in express terms to arise "whenever the surety pays to the United States the money due on such bond". The statute does not describe the exception as dependent upon the payment of all debts due by the bankrupt to the United States. Sections 3466 and 3468 are perfectly consistent, and the intention of Congress to declare by proviso the substitution of the surety in the

place of the Government as to the priority is manifest. The fact that the priority of the Government becomes the priority of the surety when the bond is fully paid negatives the idea of the petitioner that the priority accrues to the surety only when all the debts to the Government are paid. *Expressio unius exclusio alterius.*

CONCLUSION.

We may summarize and restate in another form our argument, as follows:

(1) The Government concedes that the "like priority" to which the surety is entitled is the identical priority to which the Government itself is entitled. The only question is, does the priority of the Government become the priority of the surety *when* the full amount of the bond is paid, or *only when* all the debts accruing to the United States of the bankrupt are paid?

(2) The express words of Section 3468, R. S., give to the surety, when it pays the "money due on the bond" to the United States, "a like priority" to the United States.

(3) Section 3468 does not state that the "like priority" does not arise unless and until the surety pays *more than* the amount of the bond.

(4) Nor does section 3468 require the surety com-

pany to pay in full *all the debts* due the United States by the insolvent estate before the priority of the United States becomes the priority of the surety.

(5) Whether the United States has priority over other creditors under section 3466, or under the common law, or both, is immaterial, because under section 3468 the surety has "the like priority" to the United States for the "money paid on the bond".

(6) The construction of the statutes contended for by the Government is unreasonable. If the surety paid any more than the full penalty of the bond it would be a mere volunteer as to the excess and would not be entitled to subrogation as to such excess.

(7) That the contention of the Government is further unreasonable can be readily seen when different bonds have been given by an insolvent to the United States and one surety pays the full penalty of his bond on which he is liable. Under the Government's contention he must pay all the other bonds on which he is not liable to secure the "like priority" of the United States.

(8) The construction of the Government is unreasonable in that the meaning of the statute, if the Government's contention is correct, is dependent upon the amount of the assets of the bankrupt estate; *e. g.*, if the United States has an unpaid claim against the estate, section 3468 is inoperative, and if the bankrupt's assets are sufficient to pay the claim

of the United States and the claim of the surety also, the surety is entitled to "like priority", but if the assets are insufficient to pay both the United States and the surety, then "like priority" has no meaning. We contend that sections 3466 and 3468 should be construed together so as to give both force and effect, the United States retaining its priority as to the balance of its claims against the bankrupt's estate and the surety standing on the level with the United States as to its claim, *i. e.*, given "the like priority as is secured to the United States".

(9) The history of sections 3466 and 3468 shows that section 3468 was a proviso to section 3466 and intended to carve out an exception for the benefit of the surety who has paid its bond in full.

(10) When section 3468 was enacted, the prerogative of the Government and the common-law subrogation were well understood. Having both these rules in mind, Congress provided in clear and unambiguous terms that the priority of the Government shifts to the surety when the surety pays the money due on the bond and not when the Government is paid in full.

(11) Under the rule of *expressio unius exclusio alterius* the surety is entitled to the Government's priority when the bond is paid and not when the Government is paid in full.

(12) The language of the courts in discussing these

sections sustain the views of the Referee, the District Court and Court of Appeals, and there are no decisions to the contrary.

(13) The construction contended for by us is fair, reasonable and just.

(14) The United States could have had all of its debts paid in full by requiring a larger bond. The Government fixed the size of the bond and is alone responsible for any loss to it. The surety has paid in full.

(15) The like priority of the surety is protected in all events; for, had the United States first filed its claim against the bankrupt estate before proceeding against the surety, the surety could have tendered the amount of the bond, and a refusal of the United States to accept would have released the surety.

We can come to no other conclusion than the decisions below are correct, and the petition herein should be denied.

Respectfully submitted,

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JOHN H. HOLLIDAY,
THOMAS W. WHITE,
Attorneys for Respondent National Surety Company.

271&272

Nos. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1919.

THE UNITED STATES, PETITIONER,

v.

NATIONAL SURETY COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION OF THE UNITED STATES TO ADVANCE.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1920

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, PETITIONER,
v.
NATIONAL SURETY COMPANY.
Nos. 779 and 780.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and respectfully moves that the above-entitled cases, in which writs of certiorari were granted on April 19th last, be advanced for early hearing during the October, 1920, term of this court.

The question involved herein is whether a surety company which has paid to the United States the full amount of its bond, which, however, is less than the amount due the Government from the principal, a bankrupt, is entitled to share *pro rata* with it (the United States) in the distribution of the assets of the bankrupt debtor, or whether the claim of the United States is superior and entitled to priority of payment. The decision of this question is dependent upon the construction given Revised Statutes, sections 3466

(Comp. Stat., 1916, sec. 6372) and 3468 (Comp. Stat., 1916, sec. 6374)—the former section providing that debts due the United States shall be first satisfied out of the insolvent's estate; the latter providing that when a surety has paid to the United States the amount due upon the bond of his principal, an insolvent, he shall have the "like priority" secured to the Government for the recovery and receipt of said amount out of the estate and effects of such insolvent.

Owing to the large number of contracts into which the Government is daily entering with private parties for which surety bonds are given to secure the faithful performance thereof, the question presented herein will undoubtedly arise very frequently in the future, and its correct settlement is of the greatest importance to the public business. It is requested, therefore, that an early hearing be had in these cases.

Counsel for the respondent concur in this request for advancement.

ALEX. C. KING,
Solicitor General.

MAY, 1920.

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UNITED STATES *v.* NATIONAL SURETY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 271, 272. Submitted October 13, 1920.—Decided November 8, 1920.

Revised Statutes, § 3468, which gives a surety, who pays to the United States the amount due on a bond of an insolvent debtor, the priority enjoyed by the United States over other creditors under Rev. Stats., § 3466, does not entitle the surety to share equally with the United States when the estate is insufficient to satisfy the claim of the

United States; and this construction is in harmony with a familiar rule of subrogation under which a surety liable only for part of a debt does not become subrogated to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied. P. 75.

262 Fed. Rep. 62, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Spellacy and *Mr. Leonard B. Zeisler*, Special Assistant to the Attorney General, for the United States.

Mr. Samuel W. Fordyce and *Mr. Thomas W. White* for respondent. *Mr. John H. Holliday* was also on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The National Surety Company executed as surety two bonds given to secure contracts entered into with the United States. The contractor defaulted and was later adjudicated a bankrupt. The loss to the Government was about $13,000. The Surety Company paid to it on account of this loss $3,150, the full amount of the liability on the bonds. Thereupon the Government proved its claim in bankruptcy for the balance, claiming, under Revised Statutes, § 3466,[1] priority therefor over all other

[1] Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

creditors. The Surety Company proved for the $3,150, and claimed that under Revised Statutes, § 3468,[1] it was entitled to a share in the distribution of the estate *pro rata* on an equality with the Government. The net assets of the estate were less than the amount of the Government's claim. The referee sustained the contention of the Surety Company, and his order was affirmed both by the District Judge and by the Circuit Court of Appeals for the Eighth Circuit. 262 Fed. Rep. 62. The case comes here on writ of certiorari, 252 U. S. 577. The single question presented is whether in the distribution of the bankrupt's estate the United States has priority over the Surety Company.

Section 3468, applying an established rule of the law of subrogation, *Lidderdale* v. *Robinson*, 12 Wheat. 594, 596, declares that when a "surety pays to the United States the money due upon . . .[a] bond, such surety . . . shall have the like priority for the recovery . . . of the moneys . . . as is secured to the United States." Section 3466, embodying the common-law rule by which the sovereign has priority over other creditors of an insolvent, *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35, declares that "the debts due to the United States shall be first satisfied." There is no conflict between the two sections which are substantially a reënactment and extension of the provisions of § 65 of the Act of March 2,

[1] Sec. 3468. Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon.

1799, c. 22, 1 Stat. 627, 676. The priority secured to the United States by § 3466 is priority over all other creditors; that is, private persons and other public bodies. This priority the surety obtains upon discharging its obligation. But what the surety asks here is not to enjoy like priority over such other creditors, but equality with the United States, a creditor whose debt it partly secured. To accord such equality would abridge the priority expressly conferred upon the Government. While the priority given the surety by the statute attaches as soon as the obligation upon the bond is discharged, it cannot ripen into enjoyment unless or until the whole debt due the United States is satisfied. This result is in harmony with a familiar rule of the law of subrogation under which a surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied.[1]

The judgment of the Circuit Court of Appeals is

Reversed.

[1] Sheldon on Subrogation (2nd ed.), § 127; Pomeroy Equity Jurisprudence (4th ed.) § 2350; 25 R. C. L. 1318; *Peoples* v. *Peoples Bros.*, 254 Fed. Rep. 489, 491, 492; *United States Fidelity & Guaranty Co.* v. *Union Bank & Trust Co.*, 228 Fed. Rep. 448, 455; *National Bank of Commerce* v. *Rockefeller*, 174 Fed. Rep. 22, 28.